THE JOURNAL OF AMERICAN CITIZENSHIP

POLICY REVIEW

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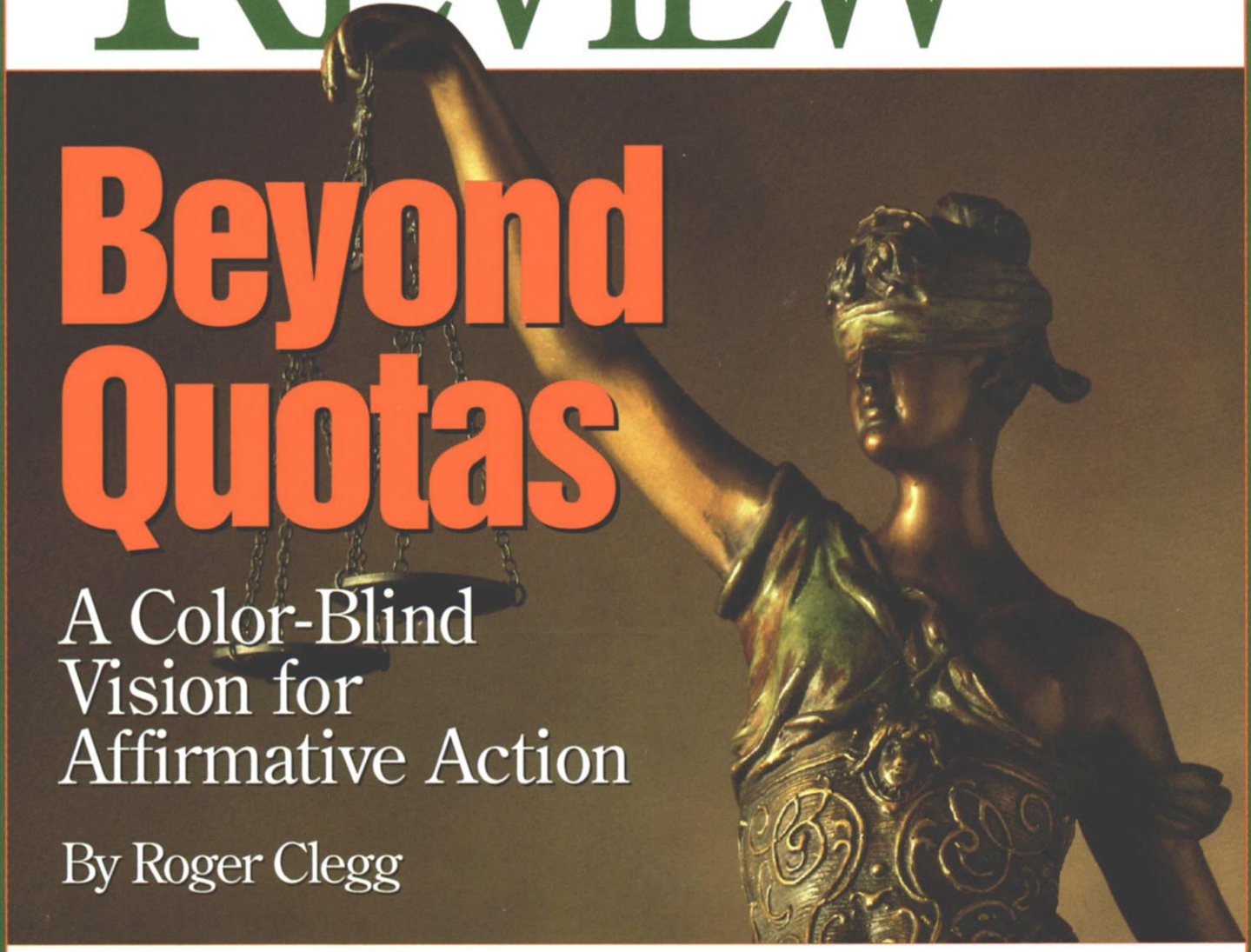

Beyond Quotas

A Color-Blind Vision for Affirmative Action

By Roger Clegg

I'll Stand Bayou
Joe Loconte on Louisiana's Covenant Marriages

The New "Massive Resistance"
Clinton Defies the Court on Racial Equality

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Clint Bolick on Libertarian Foes of Vouchers

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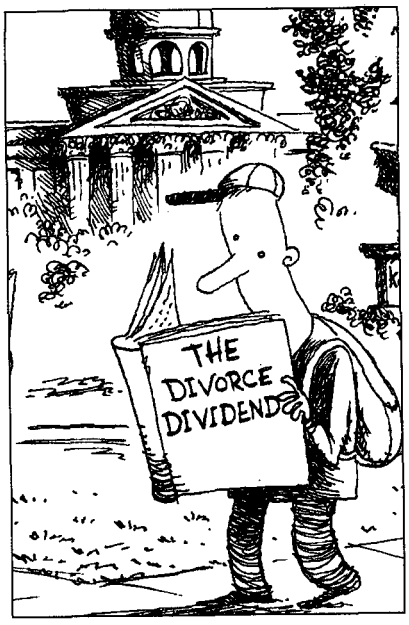

Throwing the book at marriage

p. 5

Features

12 Beyond Quotas
A color-blind vision for affirmative action
BY ROGER CLEGG

22 The New "Massive Resistance"
The Clinton administration defies the Constitution to save racial preferences
BY TODD GAZIANO

30 I'll Stand Bayou
Louisiana couples choose a more muscular marriage contract
BY JOE LOCONTE

35 Learn While You Earn
Education savings accounts offer Congress a chance to advance tax reform, help families, and counter Clintonian politics
BY JOHN HOOD

39 No Strings Attached
A private college spurns federal aid to save its academic freedom
BY JOHN H. MOORE

42 Blocking the Exits
Libertarian opposition to school vouchers is an attack on freedom
BY CLINT BOLICK

45 Memphis's Medical Graceland
Traditional health care neglects the working poor. A church-based clinic steps in
BY G. SCOTT MORRIS

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Departments

3 Correspondence
Suburban sprawl; Thaddeus Lott; Buckley on tape; who will teach the teachers?

5 Home Front
Think welfare policy undermined the family? Try reading a few college textbooks

9 Laboratories of Democracy
Steven Hayward profiles South Carolina governor David Beasley

State of the states: union dues and political contributions; environmental waivers; eliminating racial preferences

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Policy Review: The Journal of American Citizenship illuminates the families, communities, voluntary associations, churches and other religious organizations, business enterprises, public and private schools, and local governments that are solving problems more effectively than large, centralized, bureaucratic government. Our goal is to stimulate the citizenship movement—chronicling its success stories, exposing its obstacles and opportunities, and debating the policies that will best invigorate civil society.

American citizenship combines freedom with responsibility. These are the two great themes of modern conservatism, and they build on the best of the American tradition. Americans come from all races, all nationalities, all religions. Americans are united in citizenship not by common ancestry but by a common commitment to the political principles of the United States: the Constitution, the rule of law, the rights to life, liberty, and the pursuit of happiness.

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Policy Review: The Journal of American Citizenship is published by The Heritage Foundation, a research and educational institute that formulates and promotes conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense.

"Classifications and distinctions based on race or color have no moral or legal validity in our society. They are contrary to our constitution and laws."

—Thurgood Marshall

NAACP brief in Sipuel v. Oklahoma State Bd. of Regents *(1947)*

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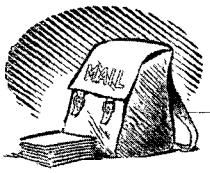

Correspondence

Breaking Cities

To the Editor:

In his article "Broken Cities: Liberalism's Urban Legacy" (March–April 1998), Steven Hayward makes a few good points. American cities, despite upbeat rhetoric to the contrary, *are* still struggling with high rates of unemployment and crime, broken schools, and subpar municipal services. Businesses and middle-class families *are* being pushed away from urban settings. Mayors *should* focus on a nonpartisan, back-to-basics agenda of "public safety, public works, and education." (The successful ones are doing just that.) And the federal government *does* burden cities with regulations that make re-using urban land prohibitively expensive. It should experiment with radical devolution.

But some of Hayward's assertions are completely off the mark. He states that "the decentralization of cities, and the dispersal of people, especially middle-aged, middle-class people, is a natural phenomenon that we should not hope to reverse completely." He is wrong to see the suburbanization of families and businesses as a wholly "natural" event. Although suburbanization is partly market-driven, there are, and have been, a slew of state and federal policies that underwrite suburban development and drain the vitality of cities and older suburbs. Government transportation spending is skewed toward the extension of roads into the countryside, making commercial strips and housing subdivisions economically feasible. Existing infrastructure, by contrast, is neglected. Tax subsidies for homeownership enable homebuyers to build bigger homes on bigger lots outside city limits.

Other government policies that are by no means "liberal" have helped fuel the rise in concentrated urban poverty, which is directly correlated with failing schools, high crime, and depleted services. State laws permit suburban communities to effectively bar low- and moderate-income residents from their neighborhoods and schools and to insulate themselves from the social obligations of the entire region. Housing vouchers—designed to give low-income families choice in the rental market—have been administered by a patchwork of political jurisdictions without regard to the geography of the metropolitan marketplace.

The other mistake Hayward makes is to assume that liberals, and only liberals, "are in a lather about 'sprawl' and want to impose huge new land-use regulation schemes to achieve 'the new urbanism' of higher density development." New Jersey governor Christine Todd Whitman, Connecticut governor John Rowland, and Ohio state treasurer Ken Blackwell, hardly liberal standard-bearers, have all backed variants of "smart growth" policies.

The "smart growth" movement is, in fact, deeply conservative. It says that states and localities cannot build what they cannot pay for now or support in the future. It says that farmland, small towns, and the treasured character of particular places are valuable, and should not be paved over in the name of progress.

As for "huge new land regulation schemes," Maryland's "smart growth" plan, backed by Democratic governor Parris Glendening, lets developers build anywhere they choose. But if they want state support in the form of subsidized roads, sewers, and schools, they must build in areas targeted for development.

If we want a serious urban policy, we cannot confine ourselves to an agenda of schools, crime, and deregulation. That agenda will not be enough to help cities counteract government-subsidized sprawl. Much of what has undermined cities has occurred outside city limits. We cannot save the cities without looking beyond their borders.

Bruce Katz
Brookings Institution
Washington, D.C.

To the Editor:

Steven Hayward correctly condemns the pathology-based social programs that have harmed American cities. Tolerance of crime, the public-school monopoly, bureaucratic government, and social welfare programs that infantilize the poor have all taken their toll.

But Hayward overstates his case by proclaiming that "the overriding cause of the nation's urban calamity is modern liberal social policy." If that were true, why do socialist Stockholm, recently communist Prague, and liberal, welfare-oriented Toronto look so nice and function so well? Although all three cities would certainly benefit from more market-based public policy, these cities have experienced nothing like the economic devastation found in America's old cities. So what is the difference? I would argue that massive federal subsidy of highways, to the near-exclusion of any other form of travel, is the overriding cause of the nation's urban calamity.

In Canada, the national government provides no money for interstate highways or mass transit. The major cities of Canada—Toronto, Montreal, Edmonton, Calgary, and Vancouver—all have healthy downtown areas with a rich variety of travel choices, paid for mostly by local government.

In the United States, the national government pays 90 percent of the capital costs of interstate highways, states pay 10 percent, and local sources provide nothing. The federal money overwhelms local choice. If you want to correlate the decline of American cities to a government policy, correlate poverty to miles of urban freeway in a city.

For example, compare impoverished Detroit, which has gone ahead and built every freeway it ever thought up, with San Francisco, where commuters can still choose among various forms of mass transit. Better yet, compare Berlin, most of which had been reduced to rubble by the end of World War II, with Detroit, which was then the thriving factory of world democracy. Today, someone unfamiliar with World War II would probably assume that it was Detroit that had been the epicenter of wartime destruction. Despite a social welfare system beyond the scope of anything in America, Berlin has been completely rebuilt.

Hayward needs to account for this difference. He would discover what conservative Paul Weyrich has long known: that the U.S. interstate highway program is among the most foolish and destructive federal programs ever imposed on the American people.

Mayor John O. Norquist
Milwaukee, Wis.

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Steven Hayward replies: Both letters grudgingly admit that my main critiques of urban policy were on target, and then rush to change the subject. Bruce Katz jumped for the suburban bait hook, line, and sinker, while Mayor Norquist, whose administration I admire, reminds me of the blind man who, upon feeling the elephant's trunk, declares it to be a snake.

Mayor Norquist's letter is mildly baffling in the sense that it bolsters my central point—that liberal social policy is responsible for the destruction of our urban areas—while trying to argue with it. It is true (though exaggerated) that the interstate highways have had significant effects on central cities, but that's just another example of centralized, liberal federal policy altering incentives and speeding the collapse of urban America.

The mayor's correlation of urban poverty to freeways won't hold up, however. In San Francisco, my former hometown, the pockets of poverty are correlated with proximity to mass transit, which in any case has hardly impeded the process of suburbanization in the Bay Area. Another counter-example would be Washington D.C., which has few freeways downtown but lots of poverty.

There is some merit to the writers' points, but their central contention that suburban areas have received disproportionate subsidies is at best not proven, and at worst incorrect. Katz's tacit premises are that suburban growth depends on government subsidies because it doesn't pay for itself and that "sprawl" (which is never defined precisely, even in the pages of the *Journal of the American Planning Association*) is consuming large amounts of valuable land. Both premises are axiomatic among urban planners today, but both are the result of unchallenged groupthink.

The total area of developed urban and suburban land is about 3 percent of the total land area of the continental United States, which hardly justifies the crisis rhetoric that surrounds the issue of "sprawl." The controversy over whether growth pays for itself is complicated, but Helen Ladd's study for the Lincoln Land Institute found that local government budgets grow faster in fast-growing counties than in slow-growth counties, exactly the opposite of what one would expect if it were true that "growth doesn't pay for itself."

I agree strongly with Katz's critique of exclusionary suburban zoning practices, but the right solution would be a greater respect for property rights. Liberals recoil from this principle, however, and prefer another dose of regulation and social engineering.

My great fear these days is that I will have to return to *Policy Review: The Journal of American Citizenship* in 15 years to write an article titled, "Broken Suburbs: Liberalism's Suburban Legacy." Having failed at urban renewal, let's leave suburban renewal out of government's callused hands.

Letters to the Editor

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Lotts of Learning

To the Editor:

I enjoyed Tyce Palmaffy's article on Thaddeus Lott ("No Excuses," Jan.–Feb. 1998). I am from the Houston area, so I am aware of his successes. It's a shame that he seems to be the exception instead of the rule.

I teach at Hambrick Middle School in the Aldine school district just north of the Houston school district. Last year, we received a new principal, Nancy Blackwell, who is doing great things at Hambrick. Our passage rate on the Texas Assessment of Academic Skills rose to more than 80 percent last year, and we're aiming higher this year. The rules she has put in place have put pride back into our school community. Last year, Hambrick earned "recognized" status from the state, as did the Aldine school district as a whole, the largest district in Texas to do so.

I wish that more people would take note of what Hambrick and other schools have accomplished and not just dwell on the negative, wringing their hands and talking about junking the whole public-school system. Thanks to excellent leadership, teachers across the state are expecting a lot more from Texas students than they used to.

Winifred Bellido
Houston, Texas

Re-education

To the Editor:

"See Dick Flunk" by Tyce Palmaffy (Nov.–Dec. 1997) was a brilliant review of the issues pertaining to reading. I now require my education students to read it, since most are brainwashed by faculty who adhere to whole language. The tragedy is that most teachers do not read such articles, nor are they aware that whole language is unsupported by research.

An excellent point was made in the conclusion, which read, "Egalitarians worried about the increasing distance between rich and poor should take heed of researchers' warnings." I am often shocked by conservative leaders and thinkers who are unaware that many of their ideas would benefit the poor. They allow President Clinton and other liberals to take the high ground, even though most of their proposals would hurt poor people.

Fred Stopsky
Professor of Education
Webster University
St. Louis, Mo.

WFB in Stereo

To the editor:

I thoroughly enjoyed Mark Herring's article on the need for an Electronic Conservative Clearinghouse Library ("Virtual Veritas," Nov.–Dec. 1997), and I agree with it completely. This would be not only a wonderful resource on the history of the conservative intellectual movement but would also provide scholars with a place to go for primary information.

I did want to mention that at least one of the items on Herring's conservative audio wish list is already available. "Imagine," Herring writes, "sitting down and listening to William F. Buckley Jr.'s oral history of the founding of *National Review*."

I conducted that interview, and donated it to the Library of Congress's oral history section, where patrons can listen to it. I assure you, it makes for an absorbing hour.

Tim Goeglein
Press Secretary
Office of U.S. Senator Dan Coats
Washington, D.C.

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Home Front

A Textbook Case of Marriage-Bashing

What are we teaching the next generation about marriage? Judging from a review of a representative sample of 20 recently published undergraduate marriage and family textbooks, the answer is: not very much, and what students *are* learning is probably doing more harm than good.

First, current textbooks repeatedly suggest that marriage is more of a problem than a solution. The potential costs of marriage to adults, particularly women, often receive exaggerated treatment, while the benefits of marriage, both to individuals and society, are frequently downplayed or ignored. Second, almost all of these textbooks shortchange children, devoting far more pages to adult problems and adult relationships than to children's well-being. Third, these books are typically riddled with glaring errors, distortions, and omissions.

Indeed, if these books reflect the quality of family and marriage courses currently offered in American colleges and universities, then the quality of these courses is no better than fair to poor.

Given the nature and extent of these textbooks' deficiencies, many students are likely to emerge from college courses less prepared to make wise personal decisions and to participate intelligently in public debates on family issues. In fact, students whose future decisions—as social workers, counselors, teachers, nurses, family lawyers, and other professional custodians of the family—are based on the information they glean from these books will have been consistently misled on important topics, from the risks of divorce and the benefits of marriage to the costs of voluntary single motherhood and the risk factors for child abuse.

This might not have mattered in another age. Generations ago, Americans turned most often to family, friends, or clergy for advice about marriage. But today, we increasingly depend on an array of experts, including marriage counselors, lawyers, psychologists, teachers, therapists, advice columnists, and the authors of self-help books. Even priests and ministers are now apt to rely on the secular insights of professionals like these in their pastoral work. Textbooks matter, then, because they are used to teach the professionals who are the advisers and custodians of the family as an institution.

The impact of textbooks is especially significant because the college instructors who are training the next generation of family professionals often rely on these books for their understanding of the scientific consensus on family matters, and extensively use these books to design the content of their college courses. Each semester, approximately 8,000 college courses and hundreds of thousands of students use these books as their authoritative sources on family issues. As we seek to repair our most vital and fragile of social institutions, that should worry us.

The Dangerous Institution

What kind of story do today's family textbooks tell about marriage? First, they convey the message that in America, marriage is just one of many equally acceptable and productive adult relationships. These relationships include cohabiting couples, divorced noncouples, stepfamilies, and gay and lesbian families. If anything, they tell us, marriage as a lifelong child-drearing bond holds special dangers, particularly for women who, if they don't find marriage physically threatening, will likely find it psychologically stifling.

Changing Families, by Judy Root Aulette, contains the most overtly anti-marriage rhetoric. Among her 14 chapters, Aulette devotes most of three to marriage: "Battering and Marital Rape," "Divorce and Remarriage," and, simply, "Marriage." None of them contains any mention of marriage's benefits to individuals or society.

The only debate over marriage she discusses is that between feminists and Marxists over the precise source and nature of the oppression that marriage creates. An extended discussion follows over whether, given "the problematic character of marriage," allowing gays to marry would constitute "the problem or the solution."

What college kids are reading these days: Marriage is bad for you.

Contrary to the author's spectacular assertion that marriage exists only in some societies, marriage is a virtually universal institution. Because marriage appears regularly in every known human society, it must be beneficial to the individual or society or both. Anthropologists, sociologists, and psychologists have written extensively about the functions of marriage. But in Aulette's textbook, the reader is given no hint that this vibrant and important conversation about the purpose of marriage as an institution even exists.

This is no isolated flaw. Aulette's anti-marriage animus may be more explicit than most; nevertheless, most of the other textbooks downplay the value of marriage, especially by what they fail to say. Not a single one of these textbooks, for instance, includes a systematic treatment of what scholars call the "social functions" of marriage; that is, the role of marriage historically and currently in the biological and cultural reproduction of populations and societies.

Most current marriage and family textbooks, although at times professing respect for marriage as a relationship,

by Norval Glenn

Norval Glenn is a professor of sociology at the University of Texas at Austin. He has taught courses on the family for 25 years. This article is adapted from a report commissioned by the Institute for American Values.

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institution, and especially of marriage as a morally or legally binding commitment.

Is Marriage Good for Anyone?

While playing up dubious theories about the excessive costs of marriage to women, the current generation of family textbooks shows remarkably little interest in the well-established evidence of marriage's benefits to both sexes. No book gives more than glancing attention to the substantial research literature showing that marriage confers major psychological and emotional benefits on adults.

These findings, published in major scholarly journals, including the *Journal of Marriage and the Family*, the *American Journal of Sociology*, and *Social Forces*, are amazingly consistent: Married persons, both men and women, are on average considerably better off than all categories of unmarried persons (never married, divorced, separated, and widowed) in terms of happiness, satisfaction, physical health, longevity, and most aspects of emotional health.

It is hard to think of research that is more directly relevant to students' lives or to ongoing public policy debates. Yet how much space do current textbooks devote to this evidence? Five of them do not even examine marital effects on well-being. Five others devote less than one page to the topic. No book gives more than three-and-a-half pages to it; the average amount of space per book is one-and-a-quarter pages.

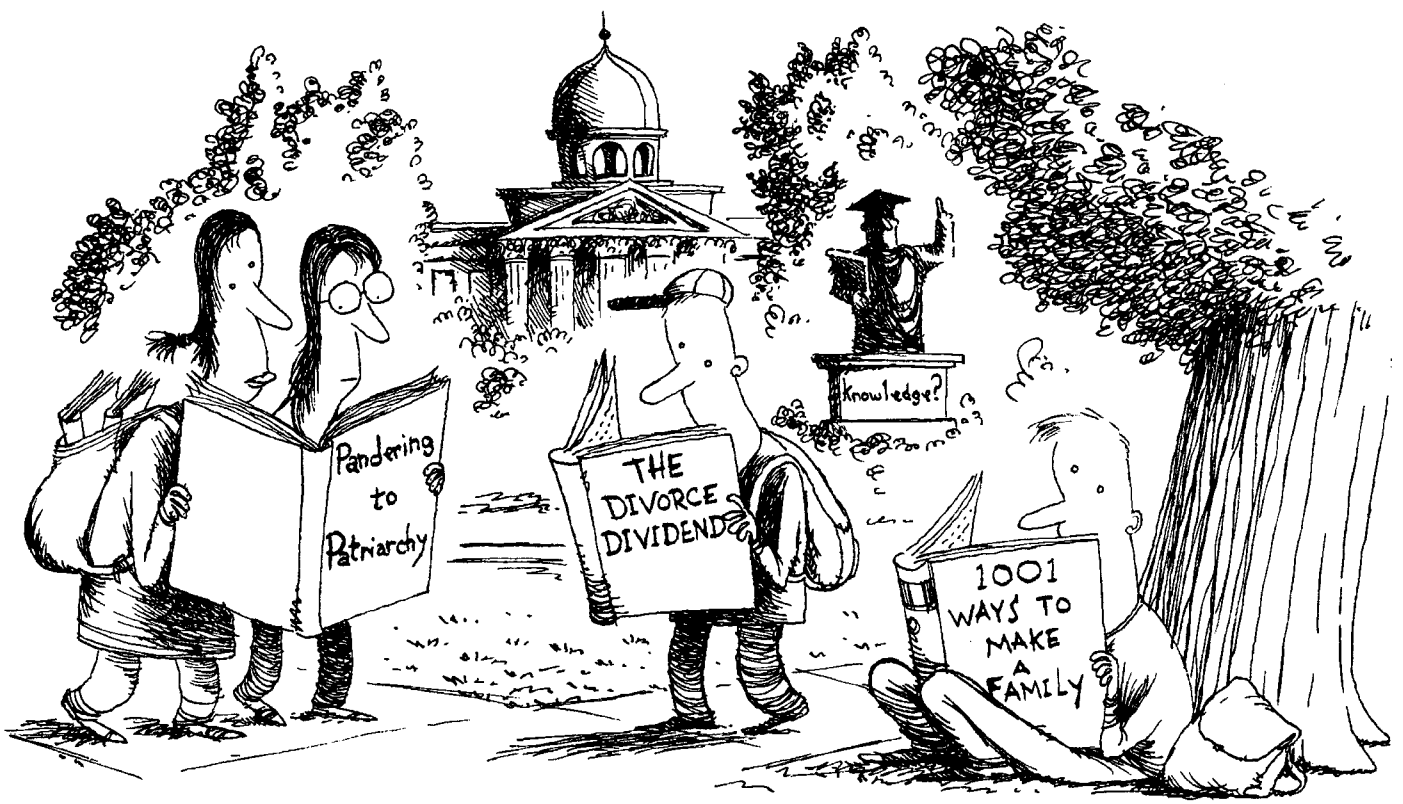
Almost half of the meager space devoted to marital effects is dominated by discussions of how marriage hurts women, including almost all of the space reserved for the topic in *Diversity in Families*, by Maxine Baca Zinn and D. Stanley Eitzen, which treats it most extensively. It is as if these textbook writers have all tacitly agreed to wear the same blinders, causing them all to live in a strange world in which all bad things about marriage (domestic violence, marital fragility, and career costs to women) are clearly visible, but all good things about marriage are either only dimly visible or not visible at all.

For example, faced with the evidence that married people are less stressed and lonely, Kenneth J. Davidson and Newlyn B. Moore, in *Marriage and Family: Change and Continuity*, boldly conclude, "It would be ludicrous to suggest that young adults who experience loneliness and stress should marry to alleviate their problems. Obviously, the same personal characteristics that resulted in their distressful state in singleness would also be reflected in marriage."

These authors thus deny the possibility of any positive effects of marriage on loneliness or stress, attributing the apparent advantage of married people to the principle of self-selection. However, among social scientists who have studied the data, most believe that marriage itself accounts for a large part of the difference in average well-being between married and unmarried persons. Indeed, loneliness is probably the negative feeling most likely to be alleviated by marriage alone.

Current textbooks show little interest in the well-established evidence of marriage's benefits to both sexes.

Bryan Strong and Christine DeVault, in *The Marriage and Family Ex-*



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perience, do cite the health benefits of marriage. At the same time, without evidence and contrary to much of the research literature, they assert, "Many of these same benefits [are] likely to accrue to cohabiting partners as well." Well, actually not. According to L.A. Lillard and Linda J. Waite, much of the health benefit of marriage to men, for example, appears to stem from a sudden drop in risky behavior—such as excessive drug or alcohol use—that follows marriage, but not necessarily cohabitation.

Hiding the Bad News

When dealing with nontraditional families—households with divorced, remarried, or unwed parents—textbook writers completely reverse their filtering process. Information about possible harm to children and society from growing up outside of intact marriages enters these books rarely, if at all, and in greatly weakened form.

Consider, for example, the relationship between family structure and juvenile misbehavior, ranging from disciplinary problems at school to the commission of felonies. Only four books discuss it at all, and each of these does so in less than half a page, on average. Family textbooks display remarkably little interest in the effects of marital disruption or single parenting on children, devoting an average of only three-and-a-half pages directly to this topic. Two books—Aulette's and David H. Olson and John DeFrain's *Marriage and Family: Diversity and Strengths*—do not discuss the topic at all. In *Contemporary Families and Relationships: Reinventing Responsibility*, John Scanzoni mentions the idea (in a chapter titled "Divorce and Its Responsibilities"), only to dismiss it.

In *The Intimate Environment: Exploring Marriage and the Family*, Arlene S. Skolnick's discussion of family structure's effects on children is typical:

"The majority of well-designed studies . . . find that family structure—the number of parents in the home or the fact of divorce—is not *in itself* the critical factor in children's well-being. In both intact and other families, what children need most is a warm, concerned relationship with at least one parent."

This is a remarkably misleading statement, especially when presented, as it is by Skolnick, as an argument against popular and scholarly concern over recent trends in family structure. Current research suggests that an intact marriage generally makes a positive difference in a child's well-being. Intact marriages also have important indirect effects on children's well-being by strongly affecting the probability that a child will have a warm, concerned relationship with a parent. Well-designed studies show that single parents, because of the pressure and stress they undergo, often find it more difficult to moderately and consistently discipline their children. It borders on educational malpractice to tell students that process matters but structure has little effect.

Most of these textbooks dedicate themselves, rather dogmatically, to the idea that intact marriages are not especially important for raising children

Textbooks overlook the connection between the rise of single-parent families and stepfamilies and the rise of child abuse.

well. The great majority of Americans who persist in thinking otherwise are, these authors frequently suggest, merely ignorant. For example, listen to Baca Zinn and Eitzen:

"Those who persist in seeing the transformation of family patterns as the source of disarray have it backwards . . . Divorce and single parenthood are the consequences of social problems rather than the cause as some would have us believe."

Any future therapist, marriage counselor, minister, teacher, or family lawyer would come away from these textbooks with the impression that marital disruption and unwed childbearing have few, if any, harmful effects on children and society.

It is not surprising, given the ongoing academic debates on the subject, that some textbooks would take this view on some particular questions. But it is a bit surprising and highly revealing that most of the textbooks would take this view on virtually every question. The result is a textbook story that seriously downplays marriage's important role in benefiting adults and in protecting children emotionally, financially, and academically. It suggests an "expert consensus" that is sharply at odds with much of the weight of social science evidence.

Missing Children

One might expect that a major focus, if not *the* major focus, of family textbooks would be the ways in which family life shapes children. Yet these 20 textbooks are overwhelmingly preoccupied with adult relationships. Just 24 of 338 total chapters in these textbooks deal primarily with the family's effects on children. In some of those chapters, up to half the space is actually devoted to other matters. Far more space—at least three times as much—is devoted to adult relations, without regard to how they affect children.

The same strange reluctance to draw any conclusions that might be construed as "pro-marriage" is also evident in the authors' discussions of violence. Child abuse is more common in certain family forms. Sexual abuse is more common in stepfamilies, for example, and child abuse and serious injury are more common in single-parent families. Surely this relationship between family structure and the risks of violence is important enough to merit mention in any balanced discussion of family violence. Yet only eight of these books do so.

Even those textbooks that note the connection between family structure and child abuse fail to draw the obvious conclusion that the rapid increase in single-parent families and stepfamilies has very likely increased the amount of child abuse in the United States. Similarly, not one of these books suggests that reversing recent trends could reduce violence against children, yet many vigorously recommend other hard-to-accomplish remedies, such as reducing sexism, racism, poverty, and violence-provoking stress.

Why Textbooks Are So Bad

Today's textbooks are creatures of the marketplace. No outside associations exercise any quality control over this key intellectual product. Demand for textbooks comes largely from undergraduate and community college instructors and professors, whose knowledge of the field, ironically, is highly dependent on the textbooks themselves. Academic journals rarely

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review textbooks; professional associations such as the American Psychological Association, the American Sociological Association, and the National Council on Family Relations also exercise little or no oversight over these books.

While most publications by college and university faculty are evaluated by colleagues, department heads, deans, and promotion committees, the writing and publishing of textbooks exists largely outside the academic oversight and rewards system. Even at teaching institutions, a scholar who writes an excellent textbook may not be furthering his academic reputation or career. On the other hand, producing an error-filled or bias-ridden textbook will not necessarily jeopardize an academic career, since these books are usually not systematically scrutinized by those who evaluate faculty performance.

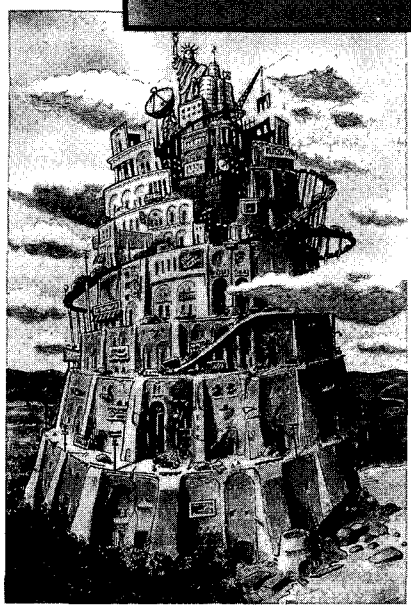
When all textbooks are ideologically biased in the same direction, the risk is that teachers and students will be locked into a narrow worldview.

Publishers' incentives are similarly skewed. Although publishers review textbook manuscripts, their outside readers are usually undergraduate teachers rather than family scholars. They may be well qualified to judge the appeal of books to students, or to other instructors, but they are seldom in a position to detect factual errors, misrepresentations of the literature, misinterpretations of data, or other similar flaws. What these reviewers know of family research is largely drawn from other textbooks, thus creating a closed loop.

It may be impossible to produce a textbook that is free of ideological bias. But when all textbooks are ideologically biased in the same direction, the danger is that teachers and students will be locked into a narrow world view, lacking even the information necessary to make their own judgments. Then the question becomes, What are our kids learning about raising kids? The answer is more than a little unsettling.

Thomas H. Naylor and William H. Willimon

Downsizing the U.S.A.



"[Naylor and Willimon] continue their search for purpose and significance. Practically everywhere they turn they see Americans paying a high price for the bigness and complexity of modern society, and they warn that imposed unity and universality are false solutions.... [They] appropriate the term *downsizing* for their own use; it becomes a tool for clearing away the physical and spiritual clutter in our lives to help us discover that less really can be more."

— *BOOKLIST*

"Legions of Americans will agree with this book's central thesis: big is bad.... Here the bigness problem is applied to our major social institutions — the economy, the city, the educational system, religion, and the state.... The book is like going back to college."

— *PUBLISHERS WEEKLY*

"Naylor and Willimon here prescribe smallness in everything, from business to the military to healthcare to education, then finally to the United States itself.... Provocative."

— *LIBRARY JOURNAL*

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Beasley Makes It Finah In Carolina

South Carolina governor David Beasley can hardly sit still in his chair as he recalls pressing state bureaucrats to upgrade their computer capability back in 1995. Beasley, a self-confessed Internet hound, wanted to network all state cabinet agencies together to eliminate duplication of effort and streamline government services. "The most shocking thing was the transition," the ebullient Beasley recalls. "One of the technicians said to me, 'You sure cause a lot of problems.' And I said, 'Mister, I've *come* to cause problems.' "

The episode typifies Beasley's aggressive, practical attitude toward governing. The 41-year-old Beasley is a rising star on the political scene, having been selected by his peers to serve as chairman of the Republican Governors Association. Beasley has a lot to be excited about at the moment. South Carolina's red-hot economy has driven the unemployment rate to its lowest level in 30 years, and during the first half of 1997 (the latest period for which national figures are available), South Carolina enjoyed the nation's second largest percentage drop in its welfare caseload. About 1,000 people a week are leaving South Carolina's welfare rolls.

Beasley comes from a family with a long political history, but his rise to the statehouse is still somewhat surprising: He was a Democrat as recently as 1991. "The probability of someone becoming a Republican in the fall of 1991," he reflects, "and then running for governor as a Republican starting in the fall of 1993—it's just highly improbable. Thank God I was just naive enough."

The district that had elected him to the state house of representatives was, and remains today, strongly Democratic, and Beasley has a long Democratic pedigree. "My dad was a Democrat, my granddad was a Democrat, my great-granddad was a Democrat," all of whom served in public office, Beasley says. "My situation was clearly one in which the Democratic party was moving so far to the Left, I finally came to the conclusion that there was no way I could stay in the party. I felt that Republican philosophy and Republican policies were more in line with what is good for America over the long term. I thought that, regardless of what happened to me politically, this was the right thing to do."

Beasley's conservative governance emphasizes two main themes: administrative competence and a presumption that the private sector can best alleviate social problems. The single most significant number he likes to cite is not tax revenues or state spending, but the level of capital investment in the state. In his State of the State message in January, Beasley touted the $16 billion in private-sector capital investment in his state during his first three years, a figure that dwarfs investment during the reign of his predecessor. In a state historically known for low-wage textile and agricultural jobs, Beasley points out, the average salary of the 80,000 new jobs generated during his first term is $30,000.

Beasley acknowledges that his private-sector orientation was acquired rather than innate. "I used to think that in many respects, government *could* solve every problem, even as a conservative," Beasley explains. His growing Christian faith led him to see the limits of political action. "Once faith became a major part of my life, I realized that government can't solve every problem. There is a limited purpose for government, as there is a limited purpose for the family, as there is a limited purpose for the church."

The governor's philosophy of social policy carries distinct echoes of President Reagan's dictum that "the best welfare program is a job." "My welfare reform strategy," Beasley says, "can be summed up in two words: economic development. The way you improve the quality of life is by creating wealth through the private sector." The best way to create wealth, he says, is to cut taxes. "Cut taxes so that families can take care of their own problems. I believe that a family knows better how to take care of their problems than government." Under Beasley, South Carolina has cut property and business taxes by more than $1 billion over the last three years.

South Carolina's governor recognized the limits of government "once faith became a major part of my life."

Beasley has also pushed for tax credits for businesses that hire welfare workers. "The business community must understand that they are part of the solution," Beasley says. He helped launch the Putting Families First Foundation, which brings together churches, local chambers of commerce, and other voluntary organizations to assist welfare families in making the transition from public assistance to self-sufficiency. "I began asking churches all over the state to adopt welfare families," Beasley explains. "Churches have all of the talent that a community needs."

Ask Beasley about education and he rolls out a 40-foot-long federal aid application form from the U.S. Department of Education that he has taped together for effect. "If you want to get a federal grant for your school, *this* is the process for your application," he says. "I would like to see the federal government do for education what it has done for welfare—give it back to the states."

At the state level, the governor has pushed hard for back-to-basics curriculum reforms through a commission

by Steven Hayward

Steven Hayward, a Bradley Fellow at The Heritage Foundation, *is the author of* Churchill on Leadership *(Prima Publishing).*

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called Performance and Accountability Standards for Schools (PASS). The purpose of the PASS Commission was "to define what a pupil at each grade should be expected to know," he says.

The state Board of Education has adopted the commission's recommendations. Now Beasley is pressing the legislature to adopt accountability provisions, the centerpiece of which is a school choice option that would provide private-school vouchers to students who attend public schools scoring in the bottom 5 percent on achievement tests. He also proposes large funding increases for new textbooks and a scholarship program that would provide $2,000 toward tuition at any state college to high-school seniors with a B average and an SAT score of at least 1000.

Beasley is as energetic about the nuts and bolts of day-to-day administration as he is about ideas. He has made streamlining the regulatory permit process a major priority, telling administrators at the state Department of Health and Environmental Quality that "your success is not measured by fines and fees." Says Ed McMullen, the president of the South Carolina Policy Council, "Beasley has put together a solid conservative staff at the top levels of his administration. He lives by the adage, 'people are policy.' "

South Carolina governor David Beasley hues to the Reagan view that "the best welfare program is a job."

Illustration by Kathryn Vierra

"If I could give another governor any advice," Beasley says, "the most important advice I could give him is that you *must* put people at the top of these agencies who not only share your philosophy but know how to practically apply it on a day-to-day operational basis." Beasley makes a point of meeting with career civil service employees to explain his philosophy in person. "You don't change the bureaucracy overnight. You have to sit down with them and talk about our approach."

From all this, Beasley might seem like a conventional conservative politician, speaking in broad themes while proceeding cautiously with incremental reforms. But he has chosen one bold target that will test his political skill: video poker. Gambling is ostensibly illegal in South Carolina, but video poker squeezed through a loophole. It has exploded in popularity, grossing between $2 billion and $3 billion a year, by some estimates, and generating more than $60 million a year in revenues for the state. Beasley speaks movingly of the growing social costs of the ubiquitous machines. One in five players is estimated to be a problem gambler, and the number of Gamblers Anonymous chapters in the state has grown fourfold in just four years.

The video gaming industry is powerful and well entrenched, and has easily turned back previous attempts to curtail or regulate video poker. So Beasley has upped the stakes, so to speak, by calling for a complete ban, which would represent the first significant rollback of gambling anywhere in the nation in many years. He has demonstrated his resolve by refusing to include video poker revenues in his next state budget estimate.

Though Beasley does not publicly draw the connection, his antipathy toward video poker may stem in part from his strong religious faith. An adult convert, Beasley freely admits to having been "brought kicking and screaming" into Christian faith. "People don't have to believe in my God," Beasley explains about how his faith affects his politics, "but I can at least empower people to be free not to have to be subject to the government god." Beasley counts among his favorite authors such heavyweights as C.S. Lewis and Francis Schaeffer, along with early church fathers such as Eusebius and Augustine.

Beasley is a strong favorite for reelection this fall, and he is rumored to have ambitions beyond the state house. Based on his energy and record so far, he is worth watching.

The State of The States

Mixed Bag on Preferences

By a vote of 19-11, the **Arizona** state senate defeated a proposal in late February to eliminate race and gender preferences. Seven Republicans joined all 12 Democrats in opposing the ban. Sponsors of the proposal, which was modeled closely on California's Proposition 209 (the California Civil Rights Initiative), now plan to put the measure on the November ballot. Meanwhile, the **South Carolina** house of representatives approved a bill to ban preferences in state government programs by a lopsided vote of 74 to 37, and in **California**, Governor Pete Wilson issued an executive order in March ending quotas and set-asides in state contracting.

The Devil in the Details

Tucked away in the long list of voter initiatives on **California**'s June ballot is Proposition 223, a statute that would bar school districts from spending more than 5 percent for administration beginning with the 1999-2000 school year. Conservative legislators and education reformers who have seen similar proposals stymied in the legislature over the years rushed to endorse the measure, until Royce Van Tassell, a researcher at the **Pacific Research Institute**, dug into the fine print. Van Tassell's suspicions were aroused by the fact that the initiative was sponsored by the United Teachers of Los Angeles, one of the most militant teachers unions in California. Buried deep in the initiative's language is a cleverly worded clause that would prohibit school districts from contracting out services such as transportation, cafeteria and food service, and security.

If it passes, the initiative jeopardizes several charter schools in California that have relied heavily on contracted services to maximize resources for the classroom. It appears that teachers unions see the independence

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of charter schools as a threat to their influence and as the leading edge of a school-voucher movement. Several conservative legislators have withdrawn their endorsement of the initiative.

School Choice Breakthrough

In a closely watched and hard-fought battle, the Southeast Delco school board in Delaware County, **Pennsylvania**, approved a voucher plan for its students. The board voted 7-0 to provide $250 for students attending private kindergarten, $500 for grades one through eight, and $1,000 for high school. With a total enrollment of more than 4,000 students and rising, the district thinks the voucher plan will actually save money by reducing the need for costly new facilities to meet rising enrollment.

The plan is expected to cost the school district about $1.2 million next year. Both **People for the American Way** and **Americans United for Separation of Church and State** lobbied against the plan.

A Race to the Top

One of the leading arguments against the devolution of welfare policy—that states freed from federal mandates would engage in a "race to the bottom"—is showing up again in the debate over environmental policy. Both the **Competitive Enterprise Institute** and the **Reason Public Policy Institute** have argued that the next step in devolution to the states could come in the form of federal environmental "waivers" similar to the early welfare waivers that allowed the experiments in Wisconsin and elsewhere to go forward. House Speaker Newt Gingrich has indicated his interest in the idea.

Urban and suburban land takes up 3 percent of the continental United States, yet local planners fear we are "running out" of room.

Anticipating the "race to the bottom" argument, the RPPI has studied examples of current state and local efforts at environmental protection that approach the problems of wildlife protection, resource use, and industrial pollution more creatively than the feds. State and local efforts emphasize problem-solving over punishment and cooperation with the private sector over regulatory compliance. For example, **Illinois** established a "Clean Break" program for businesses willing to declare and correct environmental violations voluntarily. The program gives small businesses assistance and relief from penalties if they comply with relevant regulations within a reasonable amount of time.

For more information on the "Race to the Top" report, contact the Reason Public Policy Institute at 310-391-2245; Web site: www.reason.org.

A Strike at Union Activism

The June vote on California's Proposition 226, the "Paycheck Protection Act" that would prohibit labor unions from using dues for political purposes without the express permission of individual union members, has drawn intense interest. In the meantime, the **Wyoming** legislature has quietly enacted a "paycheck protection" law. Governor Jim Geringer signed the law on March 12. Wyoming is the fourth state (after **Washington**, **Michigan**, and **Indiana**) to enact some form of paycheck protection legislation. Initiatives similar to California's Prop 226 appear headed for the November ballot in **Oregon** and **Nevada,** as well.

Alice in Zoningland

The controversy over "suburban sprawl" is increasingly reminiscent of the scene from Lewis Carroll's *Alice in Wonderland* where Alice enters a large dining room to find the red queen and two of her minions: "The table was a large one, but the three were all crowded together at one corner of it. 'No room! No room!' they cried out, when they saw Alice coming. 'There's *plenty* of room!' said Alice indignantly, and she sat down in a large armchair at one end of the table."

The red queen could be the head of the planning and zoning commission in any of a number of American metropolitan areas. Despite the fact that developed urban and suburban areas use up only about 3 percent of the total land area of the continental U.S., the leading concern of local planners today is that we are "running out" of land. This controversy is especially acute in western states such as **Arizona** and **New Mexico**, both of which are only about 1 percent urbanized. Environmentalists in Arizona are sponsoring a ballot initiative that would require communities to adopt **Oregon**-style urban boundaries, which compel higher-density development. The New Mexico state legislature is considering a similar measure.

Wyoming has enacted a law that would prohibit unions from using dues for political purposes without members' permission.

Challenging the Edifice Complex

While voters in San Francisco and Tampa, Florida, are the latest to approve expensive bond measures to subsidize new stadiums at the behest of sports plutocrats, voters in the "small market" city of Pittsburgh rejected a bond measure for new stadiums for their football and baseball teams. The "no" vote was 65 percent.

Undeterred, Pittsburgh's civic leaders may approach the voters again with a proposal to hike the sales tax by a percentage point and boost the hotel tax to support construction of *two* new $200-million stadiums (the two teams each want their very own single-purpose stadiums). The Pittsburgh-based **Allegheny Institute**, which spearheaded the successful opposition to the previous measure, has weighed in with sensible alternatives to a tax hike, such as facility naming rights, stadium advertising, luxury box rentals, and other revenue sources. Altogether Allegheny estimates that such internal revenue streams could provide up to $440 million, enough to build both desired stadiums or renovate Three Rivers Stadium. Team owners, of course, would rather have the taxpayers foot the bill so that they can keep these revenue streams for themselves.

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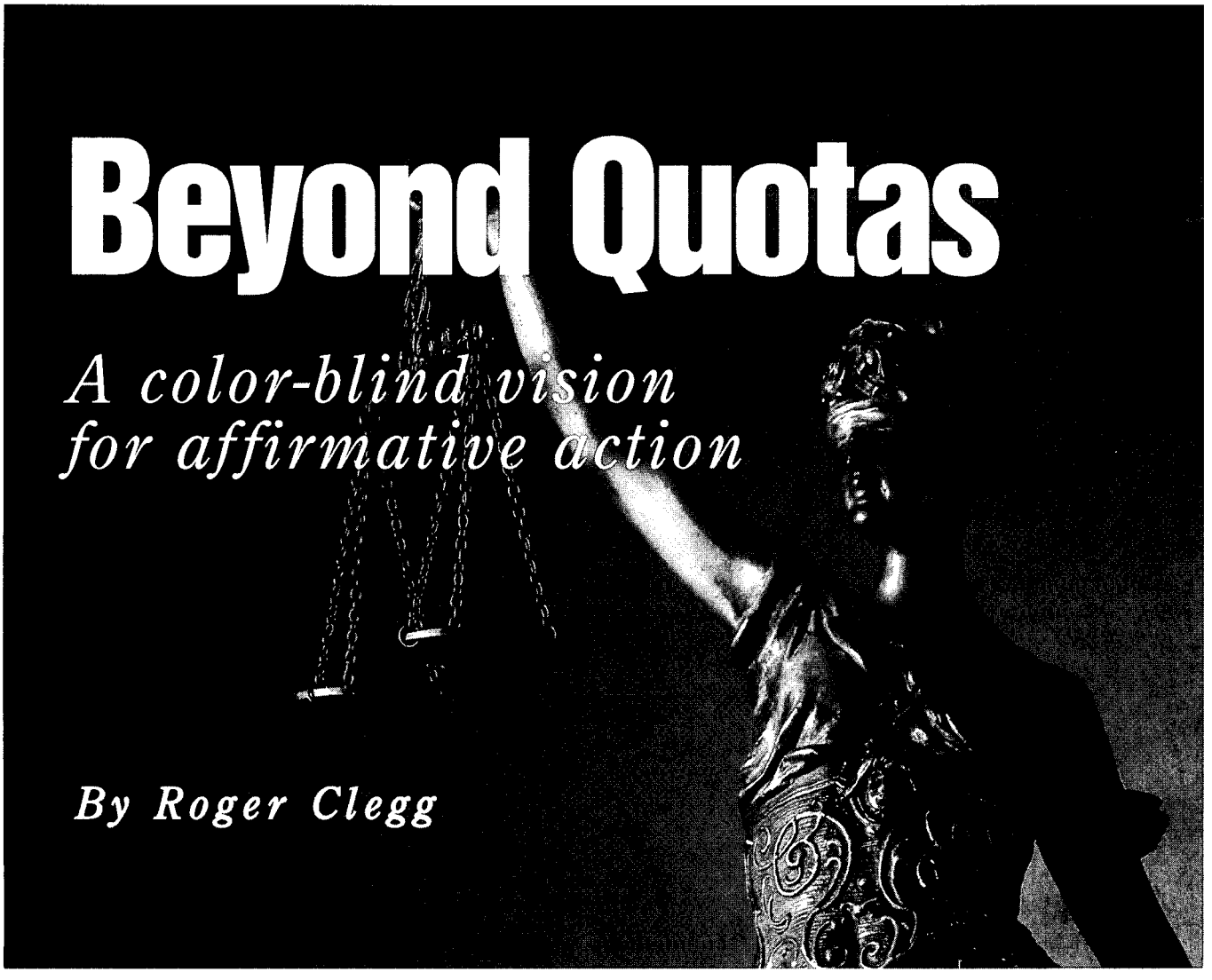
The term "affirmative action" is dangerously ambiguous. To some it means simply public policies that afford individuals opportunity without discrimination. To others, it means the use of preferences in public life to assist groups on the basis of their race, ethnicity, or sex. Not surprisingly, many people oppose the preferences that constitute this second kind of affirmative action. But those who support preferences exploit the term's ambiguity to mask their agenda and claim broader support for it than they really have. Liberals as well as conservatives have criticized the institutionalization of preferences based on race, ethnicity, and sex that now honeycomb employment, contracting, and college admissions. These preferences can be blatant or subtle, but the basic problem is the same: Someone is gaining, or not gaining, some benefit because of his race, ethnicity, or sex. Call it whatever you like, but it's discriminatory, it's wrong, and it ought to be opposed.

Beyond Quotas

A color-blind vision for affirmative action



By Roger Clegg

Photo © Will Crocker / Image Bank

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Those of us who criticize preferences need to do a better job, however, of explaining the kind of affirmative action we favor. This includes not only aggressive anti-discrimination efforts, but also positive, race-neutral initiatives to create and publicize economic and educational opportunities for everyone willing and able to compete for them. What follows is an attempt to articulate the basis of a color-blind vision for affirmative action in government policy.

Rooting out Discrimination

When it first entered common usage in the 1960s, the term "affirmative action" meant aggressive nondiscrimination. Government agencies promised to take positive steps—that is, "affirmative" action—to ensure that neither they nor the contractors they hired discriminated. Discrimination against minorities, especially blacks, had been going on for years, and was deeply embedded in many places. Simply deciding not to discriminate would not be enough; that decision had to be announced, publicized, advertised, posted, codified, and enforced, over and over again, until everyone knew that the old way of doing business was no longer acceptable.

The principle of nondiscrimination—not preferences—has best ensured equal opportunity in the past and offers the best course for the future.

President Kennedy first used the term in the context of racial discrimination when he signed Executive Order No. 10,925 in 1961. The executive order read, "The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, *without regard to* their race, creed, color, or national origin."

This core meaning of affirmative action is still embedded in the law. The main guideline relative to affirmative action under Title VII of the Civil Rights Act of 1964, banning discrimination in private employment, states, "Affirmative action often improves opportunities for all members of the work force, as where affirmative action includes the posting of job vacancies. Similarly, the integration of previously segregated jobs means that all workers will be provided opportunities to enter jobs previously restricted."

This definition is completely consistent with the principle of color-blindness imbedded in the Constitution. Justice Sandra Day O'Connor wrote in *City of Richmond v. J.A. Croson Co.* (1989) that it is perfectly permissible for a city "to prohibit discrimination in the provision of credit or bonding by local suppliers and banks." In a recent decision overturning a county's race-conscious set-aside program, a federal court of appeals declared: "The first measure every government ought to take to eradicate discrimination is to clean its own house and to ensure that its own operations are run on a strictly race- and ethnicity-neutral basis. The County has made no effort to do that. Nor has the County passed local ordinances to outlaw discrimination by local contractors, subcontractors, suppliers, bankers, or insurers. Instead of turning to race- and ethnicity-conscious remedies as a last resort, the County has turned to them as a first resort" (*Engineering Contractors Association v. Metropolitan Dade County*).

Nor should we deny the happy fact that racial discrimination is not as severe as it was a generation ago. It is the principle of nondiscrimination—not preferences—that has best ensured progress toward equal opportunity so far and that offers the best course for the future. George R. LaNoue and John C. Sullivan, scholars at the University of Maryland–Baltimore County, are experts on racial preferences in government contracting. They contend that governments embracing preferences typically have not first exhausted their options for rooting out discrimination in their practices. They have argued that, in lieu of racial preferences, governments should create "effective legal sanctions against discrimination connected to [their] procurement process and . . . vigorously enforce them" and reduce "the unnecessary barriers firms (small and minority) face in [their] procurement process."

If government administrators are discriminating against minority-owned contractors, they write, "bureaucrats can be disciplined and removed. If prime contractors are discriminating against minority subcontractors, contractors can be debarred. If lenders, insurers, or bonders are discriminating, they can lose their licenses or be fined." They lament that "there has been very little development of grievance procedures or even ombudsmen offices where issues in public contracting could be considered to determine if they were matters of poor communication, inappropriate business practices, or discrimination."

LaNoue and Sullivan recently advised the City of West Palm Beach, Florida, to ensure that all its employees and contractors know that "it is illegal to discriminate in the awarding or implementing of any city contract," that "it is illegal for any prime contractor to discriminate in any practice regarding the employment of subcontractors on city contracts," and that "it is illegal for any bonder, supplier, insurer, licensor, trade association or union to discriminate in connection with any city contract."

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Casting a Wider Net

In addition to a policy of aggressive nondiscrimination, governments can take many additional steps to ensure that eligible outsiders know about and apply for jobs, contracts, educational opportunities, and the like. Public officials can advertise educational, employment, and contracting opportunities in a wide variety of forums; speak and write to high schools, colleges, unions, and trade associations; and educate people about the application process.

It is often in the government's long-term interest to help develop the talent in groups of individuals or companies. Newer and smaller companies may merit special help in meeting the bonding requirements for federal contracts. Low-income areas may be a promising source of workers, if their residents are offered training and transportation. In education, older individuals may have promising second careers if they are retrained, and the government could encourage these moves through a variety of financial incentives; promising disadvantaged students can be given SAT coaching and encouraged to apply to college; financially strapped students with potential may deserve government loans or scholarships, and those from depressed areas or broken homes may deserve a second look from colleges in spite of their academic performance. But there is no reason to consider race in any of these cases.

Universities are opening their doors to disadvantaged individuals without resorting to preferential treatment based on race.

Conversely, governments, employers, and universities should eliminate any selection criteria that unfairly and unwisely discourage participation in their programs, such as a rule that only contractors with five years' experience will be considered for a government contract. State and local officials should examine regulations that impede entry-level jobs and businesses, such as occupational licensing laws and government monopolies.

Education

There are probably few factors as important to the pursuit of economic opportunity by minority groups as higher education, and few areas in which racial preferences are more pervasive. A number of universities, however, are demonstrating ways they can open their doors to disadvantaged individuals without resorting to preferential treatment based on race.

First, however, a word of caution. The programs discussed in this article purport to be nonpreferential, but perhaps some are not so administered. The point is that the success of these programs in no way hinges on such preferences, and, indeed, would be compromised by them.

The Trio Programs. The federal government funds color-blind programs primarily for students from low-income families that have never had any member graduate from college. Administered through the National Council of Educational Opportunity Associations, the $500-million Trio initiative includes Upward Bound, which offers extra tutoring in core subjects to secondary students in 680 schools around the country; Talent Search, whose 320 chapters counsel about 300,000 high-school students on college opportunities; and Student Support Services (SSS), which provides academic tutoring and counseling to students at more than 700 colleges. There is evidence that the programs are succeeding. Upward Bound, for instance, has been shown to prompt students to tackle a more rigorous high-school curriculum and raise their expectations of continuing on to college.

University of Maryland at College Park. At the University of Maryland, the Academic Achievement Program offers about 120 promising students with marginal high-school records another opportunity to matriculate. The students, who all come from low-income families or families in which no one has ever graduated from college, attend a summer session to learn study skills, take special writing and math courses, and receive academic counseling. If admitted, they follow a highly structured curriculum as freshmen, and receive support services such as academic and career counseling during their first two years. The program ends after the second year.

University of California. Since the University of California (UC) Board of Regents voted two years ago to abolish racial preferences in admissions, the nine-campus system has expanded opportunities for the economically and educationally disadvantaged without lowering admission standards. In the last two years, the system has begun or expanded a range of programs designed to help prospective applicants overcome barriers to matriculation and graduation. It is expanding programs that provide academic enrichment to K-12 students and that have already boosted college enrollment from low-performing secondary schools. UC campuses also are forming partnerships with neighboring school districts to provide mentoring and preparation for college-level work to students in low-performing schools.

A prime example is the Berkeley Pledge program. With the help of undergraduate volunteers, this program targets 40 low-performing schools in four districts near the university (with large populations of minority and low-income children) for curriculum development, summer school classes,

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Affirmative Action, the Army Way

The best affirmative action programs offer opportunities without lowering standards or expectations. That means not reserving particular jobs for blacks or any other race. It also means making a genuine effort to find and help African Americans and all Americans who might be overlooked, but who have the capacity to excel.

The U.S. Army is the best existing model of effective affirmative action in America. Although some of its outreach and training programs include racial preferences in their administration, these elements of preference are relatively recent and could be removed without endangering the structure of the Army's affirmative action program.

Instead of lowering standards, the U.S. Army lifts its recruits.

The U.S. Army "is the only place in American life where whites are routinely bossed around by blacks," Charles C. Moskos and John Sibley Butler wrote in their book, *All That We Can Be: Black Leadership and Racial Integration the Army Way.* To wit:

- In 1995, blacks accounted for 12 percent of all commissioned officers in the Army, including 7 percent of generals.
- Moreover, "if the Army has a black center, it is its 75,000 black NCOs" (noncommissioned officers). In 1995, blacks were disproportionately represented among noncommissioned officers, accounting for 35 percent of NCO ranks compared with 24 percent in enlisted ranks.
- About a third of Army first sergeants and sergeants major—company and battalion leaders—were black.

This black advancement has taken place in a highly meritocratic environment. Enlistment in the Army is by competitive examination—the Armed Services Vocational Aptitude Battery (ASVAB) test; promotion to the rank of NCO involves a complex formula that includes test scores, performance evaluations by superiors, schooling, service records, and interviews with a promotion board. The secret of black advancement in the Army, write Moskos and Butler, is that "the Army does not lower its standards; it elevates its recruits and soldiers." Two programs deserve special mention for the way they have provided training and educational opportunities that enable potential soldiers and officers to make the grade:

The U.S. Military Academy Prep School, based in Ft. Monmouth, New Jersey, is a 10-month program to prepare young men and women of leadership ability for admission to the U.S. Military Academy at West Point. A quarter of the students are high-school graduates who were not accepted at West Point, a quarter are athletes who cannot meet the normal academic requirements, and half are from junior enlisted ranks in the Army. About 20 percent of each class are black. Of the 300 students admitted to the prep school class of 1992-1993, 200 completed the program, and the military academy admitted 176, who made up about a sixth of all West Point plebes.

This prep school greatly enlarges the pool of eligible black (and nonblack) candidates for West Point. In 1993, 84 blacks were admitted to the U.S. Military Academy, 6.8 percent of the incoming class. Of these, 40 percent were products of the prep school. The prep school focuses on mathematics, reading, and other academic skills. After 10 months, it raises the average white SAT score by 100 points and the average black SAT score by 120 points. In sharp contrast to the low graduation rates experienced by students admitted through racial preferences to many colleges, the West Point graduation rate of black USMAPS alumni actually exceeds the average graduation rate of the entering plebe class as a whole. A remarkable 94 percent of black USMAPS alumni admitted to West Point in 1991 graduated with the Class of 1995—compared with only 79 percent of all matriculants.

The Army has vastly expanded the eligible pool of NCO candidates through its Functional Academic Skills Training (FAST) program, a remedial program for soldiers who want to improve their reading, writing, and mathematical skills in order to raise their scores on the General Technical section of the ASVAB test. Passing this test is a prerequisite for promotion to NCO. Some 60,000 soldiers, 60 percent of them black, are enrolled in a FAST program at any one time. According to Moskos and Butler, "without FAST, the strong black representation in the NCO corps would be impossible."

"When necessary," write Moskos and Butler, "the Army makes an effort to compensate for educational and skill deficiencies by providing specialized, remedial training. Affirmative action exists, but without timetables or quotas governing promotions."

Adapted from Adam Meyerson, Michael Franc, and Todd Gaziano, "Alternatives to Racial Preferences," Issues '98: The Candidate's Briefing Book *(The Heritage Foundation, 1998).*

Photo by Reuters / Corbis-Bettmann

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and extra tutoring in core subjects. After one year, those schools showed statistically significant improvements in grades and standardized test scores.

Employment

Glenn Loury, a Boston University economist, recently told President Clinton's race advisory panel that the economic disparity between minorities and whites is caused by limited opportunity, disparities in job skills, and "behaviors," particularly among blacks, that he said make them undesirable on the job market. Hence Loury recommends "developmental affirmative action," which would extend training opportunities to underskilled people on some type of nonracial basis.

After a high-school or college graduate enters the work force, employers can offer affirmative action programs on a race-neutral basis. The United Federation of Teachers (UFT), a New York City union, has an apprenticeship program for paraprofessionals that has helped thousands move up the career ladder, obtaining education and credentials so that they can become full-fledged teachers. The UFT program provides tuition assistance and counseling, and has been replicated in other American Federation of Teachers locals. And mentoring programs, which are frequently used now by companies on a racially exclusive basis, could be offered just as easily to all eligible employees.

Government agencies also can learn from private employers. In a 1988 Hudson Institute study, Clint Bolick and Susan Nestleroth collected a variety of corporate initiatives. Some of the programs discussed by Bolick and Nestleroth have not been race neutral, but it would be easy in most cases to employ them in a race-neutral fashion.

Aetna Life & Casualty's Institute for Corporate Education has run an Effective Business Skills School, a basic skills program with three goals: moving unskilled individuals into its workforce, training existing unskilled or low-skilled workers for higher positions, and offering workers night courses in supplemental skills.

Shawmut Bank in Boston, the authors wrote, "provides training not only in such skills as data entry, but also in such areas as basic English, basic mathematics, and reading comprehension. Moreover, the second and third days of orientation for new employees include training in corporate citizenship, with skills such as dealing with customers and answering the telephone."

Bolick and Nestleroth acknowledged that "[n]ot every company can provide basic skills training itself." They can, however, pool their resources to provide such training by forming a consortium with companies requiring similar specialized skills, working with training facilities provided by civic groups such as the National Urban League, or encouraging local business groups to create training centers.

Bolick and Nestleroth urged that employers "bring information about job opportunities to the source of labor." Conversely, employers can bring the labor supply to job opportunities. Polycast Technology Corp. in Stamford, Connecticut, for instance, has used a private van company to provide round-the-clock transportation for factory workers and machine operators from the Bronx. Likewise, in Atlanta, Temp Force, Inc. has offered transportation for temporary workers to suburban companies.

Other programs that employers have adopted to expand the pool of workers available to them include literacy training, internships and work-study, public-school partnerships, and seed money for promising educational programs.

Thus, Carolina Power & Light Company has run a "Career Beginnings" program for high-school juniors who have demonstrated tenacity and drive but who are at risk of dropping out of school because of financial, personal, or family pressures. Seafirst Bank in Seattle has operated a Youth Job Program, a long-term employment and educational project to encourage low-income, at-risk high-school students to finish school. This program also supports higher education and vocational training beyond high school through employment, mentoring, and scholarship assistance.

Contracting

LaNoue and Sullivan explain that contracting outreach includes "workshops, seminars, and business forums for small business owners, as well as on-the-job-site training for their unskilled workers seeking to acquire specialized skills." They point out that, in North Carolina, the Entrepreneurial Development Program provides "practical training through one-week sessions where inexperienced small business owners actually plan a simulated project, prepare a bid, and attend a bid opening." Other outreach ideas discussed by LaNoue and Sullivan include:

- Teaching government contracting staff more about the nature of small business, and introducing staff members to new firms;
- placing advertisements in a wide range of publications, including minority publications, especially on smaller contracts which often are not otherwise advertised by the government;
- creating a statewide databank program to help

California campuses are forming partnerships with neighboring school districts to provide college preparation to students in poor schools.

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small businesses locate bid opportunities with federal, state, and local governments (the Florida Department of General Services's "Info-Bid" is such a program); and

◦ operating a toll-free hotline by which contractors can get information on projects, pre-bid conferences, and bid openings.

Justice O'Connor's opinion in *Croson* suggested a number of race-neutral measures that government contractors might use, including: "[s]implification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races . . . ." LaNoue and Sullivan also point to a "variety of capital assistance programs," including direct loans, loan guarantees, and revolving loans, and tax-exempt industrial bonds." They note that bonding requirements can be lowered—for instance, the Port Authority for New York and New Jersey eliminated such bonds for contracts under $250,000. To reduce arbitrary or discriminatory rejections, federal legislation has been proposed to require underwriters to explain to contractors why they were denied bonding.

LaNoue and Sullivan recently advised West Palm Beach, Florida, to require that any prime contractor "solicit subcontractors in a way as to make opportunities available to a broad variety of firms and choose its subcontractors in some objective way." A city can lower barriers to participation by "providing training, information, loans, etc." and by "target[ing] procurement opportunities to types of businesses it wishes to encourage," such as small businesses, emerging or new businesses, businesses that have not previously or recently held a city contract, businesses that have had credit difficulties, or businesses located in economically depressed neighborhoods.

Governments can look to a number of model programs, both public and private, that are expanding opportunities to small contractors and other businesses without regard to race.

Miami-Dade County Community Small Business Enterprise Program. In May 1997, Dade County, Florida, approved a race-neutral Community Small Business Enterprise Program. The ultimate goal of the program is to steer about 10 percent of the county's $300 million in annual construction contracts to local small businesses. To certify as a CSBE, a company must not exceed a certain threshold for annual gross receipts (which varies by type of company). The county also requires that the combined net worth of the firm's owners not exceed $750,000.

Once the firms are certified, the county allows CSBEs to bid competitively on set-aside contracts for small businesses, provides management and technical assistance from consultants and construction professionals, offers working capital and financial assistance for surety bonding, and brokers a mentor relationship with a more established local firm that can help identify weaknesses in the CSBE's bids or business plans.

Since the program began last year, about 195 firms have been certified as CSBEs, and about 18 set-aside contracts totaling $63 million have been awarded.

New York's Locally Based Enterprise (LBE) Program. In 1980, New York City established a race-neutral program for Locally Based Enterprises (LBEs) with the goal of setting aside at least 10 percent of the city's construction contracts for small, local firms. This goal is served by requiring government contractors who use subcontractors to use LBEs for 10 percent of the entire contract. LBEs also are exempt from the need to secure the payment and performance surety bonds usually required of contractors and receive help in locating working capital. To qualify, a firm must be located within the city and owned and operated independently, gross less than $2 million annually, and perform at least 25 percent of its business in the city's designated "economic development" areas.

The United Federation of Teachers operates an apprenticeship program for paraprofessionals that has helped thousands move up the career ladder.

Between 1982 and 1989, according to then-Mayor Ed Koch, 575 LBEs (qualifying under slightly different criteria) won contracts valued at $375 million. In 1992, unfortunately, the program was essentially superseded by a new gender- and race-conscious set-aside program for bids on all the city's goods and services as well as construction. If Mayor Rudolph Giuliani takes no action to renew the race-conscious program, however, it will automatically sunset in June and the LBE program will resume.

The Small Business Enterprise (SBE) program of Los Angeles County Metropolitan Transportation Authority. The Metropolitan Transportation Authority (MTA) of L.A. County adopted a plan last September to create a Small Business Enterprise (SBE) program for all MTA contracts not funded with any federal dollars. The MTA maintains a database of more than 200 qualified SBEs. Before putting each contract out for bid by prime contractors, the MTA consults its database, examines the contract for suitable opportunities for SBE participation, determines a goal for the percentage of the job that ought to be subcontracted to SBEs, and asks all prime bidders to submit a plan for achieving that goal. Prime contractors may consult the MTA's database of SBE subcontractors.

The Stempel Plan for Business Mentoring. The

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Associated General Contractors (AGC), a national trade association for construction-related firms that has long opposed race-based set-asides, has an excellent mentoring program to aid and develop small contractors of all races.

Called the Stempel Plan, the program aims to match small, new contractors, or "protégés," with older, larger, more experienced firms, or "mentors." The idea is to match two mentors with each protégé to offer technical assistance and advice on bidding for contracts, keeping the books, meeting government accounting standards, securing surety bonding and capital, and other vital management issues. The two chapters established so far take on only 10 or 20 protégés at a time, work with each one for several years, and measure success by each firm's progress toward its self-imposed goals.

Each local Stempel program may choose its own criteria for admission and the exact terms of participation. For example, the Port of Portland, Oregon (a public agency) supplements the mentors with paid consultants in such areas as management, accounting, and engineering. The AGC chapter in Kansas City, Missouri, on the other hand, is independent of government and supplements the business expertise of mentors with volunteer professionals.

Governments can look to model programs—public and private—that are expanding opportunities to small businesses without regard to race.

Plenty of jurisdictions still resort to unconstitutional preference programs to encourage the participation of small, usually local businesses in bidding for government contracts. Nevertheless, even these programs can offer ideas for race-neutral methods for opening up opportunity to small businesses. To create such opportunities, state and local governments can:

- Maintain a databank of qualified small businesses and keep them informed of coming contracting opportunities;
- solicit bids aggressively for each government contract from all qualified local small businesses;
- divide larger contracts into smaller pieces to permit maximum small business participation (when economically feasible); and
- advise small businesses on the practices and bids of past successful bidders.

Opportunity—Not Discrimination

As the public debate over acceptable and unacceptable forms of affirmative action unfolds, it is crucial that opponents of preferences understand that, while all forms of preferences are wrong, not all forms are blatant. Defenders of preferences will try to exploit this. They always insist on labeling their programs "affirmative action" rather than "preferences," because they believe—with some support—that Americans support the former but not the latter. Thus, Mayor Bob Lanier of Houston cleverly used his authority to rewrite the official description of an initiative on his city's ballot last fall, changing its wording from anti-preference to anti-affirmative action. The initiative was defeated, and many attributed the loss to the relabeling.

The term "affirmative action" is of decreasing utility, but it is not hard to define a preference. If somebody's race, ethnicity, or sex weighs in a person's favor when some judgment or decision is being made, that person has received a preference because of race, ethnicity, or sex. A preference, in other words, is a form of discrimination. It does not matter whether the beneficiary of the preference meets some set of other, minimum qualifications. It doesn't matter whether other factors are also considered, or that there are no precise quotas. If the government puts its thumb on the scale because of race, then it has used a preference.

This is wrong. The government may not draw racial distinctions among its citizens and treat them differently on that basis. Preferences are unconstitutional, except in a very narrow set of circumstances. The Fourteenth Amendment to the Constitution, passed during Reconstruction, guarantees to all Americans the "equal protection of the laws," and the Supreme Court has made clear that this prohibits all government classifications based on race, except when "narrowly tailored" to achieve a "compelling interest."

It will be a rare situation that a racial preference can pass this "strict scrutiny," which is the most difficult standard that the Court recognizes in its constitutional cases. (See the Court's opinions in *Adarand Constructors, Inc. v. Peña* [1995] and *City of Richmond v. J.A. Croson Co.* [1989].) And if a race-neutral remedy is sufficient to cure a race-based problem, said the Eleventh Circuit Court of Appeals, "then a race-conscious remedy can never be narrowly tailored to that problem." (*Engineering Contractors Association v. Metropolitan Dade County* [1997].)

Recruiting and outreach preferences. Recruiting and outreach efforts that are race neutral are, as discussed earlier, an example of good affirmative action. It is nonetheless frequently suggested that, while it is objectionable to consider race in awarding, say, a contract, it is permissible to make special efforts to encourage women and minorities to *apply* for that contract. The idea is that this ensures that a "wider net" is cast at the recruitment stage, and that this outreach is not discriminatory so long as, when the contract actually is awarded, the bidder's race, ethnicity, and sex are ignored.

Similar outreach programs are often proposed

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in education, employment, and other contexts. There, too, a distinction is drawn between preferences at the recruitment stage and preferences when the ultimate admission, hiring, or other decision is made.

This approach, however, is flawed. First, as a philosophical and constitutional matter, it cannot be denied that a racial classification is still being used by the government. Strict scrutiny will be required, and it will be very difficult to show that these racial classifications are narrowly tailored to achieving some compelling governmental purpose.

The racial classification is not only a problem theoretically, but can result in real injustices. Suppose there are two contractors—one black and one white—who would be eligible to bid on a government contract. The black contractor gets a letter from the government apprising him of the opportunity and encouraging him to bid, and the white one does not. This is discrimination based on race, and presumably the existence of such a practice will mean that sometimes the black contractor will get the contract and the white one won't. Otherwise, what's the point of the letter?

Another problem with this approach is that, as an administrative matter, it seems likely that the bureaucrats enforcing the requirement of race-based *recruiting* will find ways to encourage race-based *awards*, too. It will be easy for them to suggest to prime contractors that their recruitment efforts will be challenged if the actual subcontracting awards result in "underrepresentation" of minorities and women; this tactic has been pursued for years in the employment context by the Office of Federal Contract Compliance Programs in the Department of Labor.

Likewise, if racial classifications are said to be permissible for "outreach" programs but not for "nonoutreach" programs, the bureaucrats will simply play the semantic game of relabeling all racially preferential programs as outreach programs. Thus, the Justice Department recently advised the state of Delaware that its racially exclusive scholarship program "was a recruitment or 'outreach' program" and thus "did not fall afoul of *Adarand*."

Predictable subterfuges. The problem of bureaucratic intransigence has broader importance. Bureaucrats who have been administering a program in a particular way for years will not want to change, for reasons of both ideology and laziness. During the 1980s, for instance, federal agencies were told to stop using racial preferences and, instead, to grant a preference to any business that was "socially and economically disadvantaged." As a practical matter, however, this did not result in much change, since the bureaucracy simply proceeded to presume that all minority-owned companies met the "new" criterion and that no white-owned companies did.

Accordingly, a ban on affirmative action for minorities that requires affirmative action for the "socially and economically disadvantaged" is likely to result in little change. Any new category must *not* be defined in a vague and open-ended way, because the bureaucrats will do their best to shoehorn their old classifications into the new boxes. Only if the new classifications are clearly and objectively defined will they have any chance of success.

Race-conscious below the surface. If we reject statutes that classify according to race with respect either to awards or outreach and that are likely to be administered in a race-based way, the legislator who wants desperately to support a program that "replaces" preferences and still helps minorities will naturally be tempted to support selection criteria that are neutral on their face—but designed to help those minorities.

In Texas, for instance, when the university system had to abandon race-based preferences as a result of a court ruling, the *Wall Street Journal* reported that a bill was introduced in the state house that "would require admission of the top 10 percent of each high school, assuring the entry of students at largely black and Hispanic schools regardless of their national test scores." Likewise, a proposal in the state senate "would set aside fully 40 percent of university admissions for poor or disadvantaged students, but would widen the definition of disadvantage so much that many middle-class minorities would still have a chance to qualify." Both proposals were offered with the expectation that more minorities would be chosen than under the nonpreferential use of the old criteria. The house proposal passed.

Similarly, the University of California system is considering whether to rely less on SAT scores because of concerns that, in the post–Proposition 209 world, the use of standardized tests will result in too few blacks and Hispanics at its top schools.

But this approach is not acceptable either. In deciding whether an approach is truly nondiscriminatory, it is always useful to put the shoe on the other foot—that is, to ask whether a similar course of action would be permissible if it *hurt* minorities. Suppose that Texas or California had been ordered to stop discriminating *against* blacks and then decided to change its selection criteria to maintain the status quo. That would not be allowed, because the deliberate adoption of even neutral criteria because of their racial impact is still discrimination.

The Stempel Plan matches two mentor firms to each protégé to offer technical assistance and advice on bidding for contracts.

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Note that this is not the same thing as the (correctly) criticized "disparate impact" theory of discrimination, which holds that facially neutral criteria are illegal if they have a disparate impact on a racial minority even if they are not adopted with discriminatory intent (see *Griggs v. Duke Power Co.*, 1971). Here the criteria *are* adopted with discriminatory intent.

Thus, if the government decides that it will set aside a portion of its contracts for companies that were started up within the last three years because it calculates that, by doing so, it will increase the number of minority-owned businesses that receive contracts, it has violated the Constitution. On the other hand, if it makes the same decision because, for economic reasons, it thinks that new companies should be encouraged to bid on government contracts, it has not violated the law. The Supreme Court has made clear that the issue of discriminatory intent is crucial.

Words of Caution

Even many conservative opponents of preferences seem to have concluded for political reasons that any legislation aiming to abolish preferences must include support for some other kind of affirmative action. Thus, Representative Charles Canady is rewriting his legislation banning federal preferences based on race, ethnicity, or sex—which was tabled last year when moderate Republicans defected—to mandate affirmative action. Senator Mitch McConnell, who has offered an amendment to the federal highways program that would ban the use of such preferences in government contracting, has included a similar provision in his bill.

But we have seen that there is a right kind and a wrong kind of affirmative action. Any legislation motivated by its impact on a particular racial group is constitutionally suspect. If a legislator wants to replace preferences with a program that helps minorities *because* the new program is, like preferences, aimed at helping minorities, then he is contemplating an unconstitutional act. The mindset that sees every program through the prism of race has to be discarded.

Where minorities are "underrepresented" in a particular field, it may be because of discrimination, but—happily—this is less and less likely to be the case. It may be because of simple lack of interest in a particular area. Not every ethnic group will be mirrored precisely in every profession; some will gravitate to certain sectors of the economy, other groups to other sectors, for a wide variety of historical and social reasons. There is nothing sinister in this.

Where someone *is* interested in a particular area and, for nondiscriminatory reasons, is not succeeding, there may be a legitimate role for government. But when a person fails to achieve because of a lack of skills, it is better for government to help the person acquire those skills than simply to redistribute the achievement to him.

Moreover, not every nondiscriminatory program is a good program. New proposals should be evaluated by the same criteria with which conservatives judge any new government proposal. In particular, we must beware of the unintended consequences that inevitably follow when the government creates programs that ease the adverse results of circumstances created by individuals themselves.

Preferences are a poor way to fight discrimination—their original rationale—because they create resentment among whites and a victim mentality among minorities, rubbing salt into our racial wounds rather than healing them. They gloss over our worst social problems, which affect minorities disproportionately, though not exclusively: illegitimacy, crime, drug use, and deteriorating public schools, especially in our inner cities. It is these problems that keep many minorities from developing the skills needed to compete for diplomas, jobs, and contracts, and that make preferences seem necessary. The better approach is to attack the underlying problems themselves.

Great Society programs and the liberal culture of permissiveness must shoulder much of the blame for destroying black families and the inner city; the educational establishment has ruined many public schools, especially in those same urban areas; government regulation hurts new and smaller companies more than older, established ones. Charter schools, merit-based pay for teachers, and vouchers; less government regulation, perhaps targeted at enterprise and empowerment zones; and—especially—reinvigorated inner-city churches point the way to greater progress for all Americans, and especially black Americans.

It seems likely that the bureaucrats enforcing the requirement of race-based recruiting will find ways to encourage race-based awards, too.

Conservatives must focus on *opportunity*—not on mandating proportional representation, not on eclipsing opportunities for some in order to redistribute goodies to others. And the government should not discourage people from making the most of opportunities they already have.

***Roger Clegg** is the general counsel of the Center for Equal Opportunity, a conservative, Washington, D.C.-based think tank. Clegg is a graduate of Yale Law School, and served for four years in the Reagan and Bush administrations as a deputy in the Justice Department's civil rights division.*

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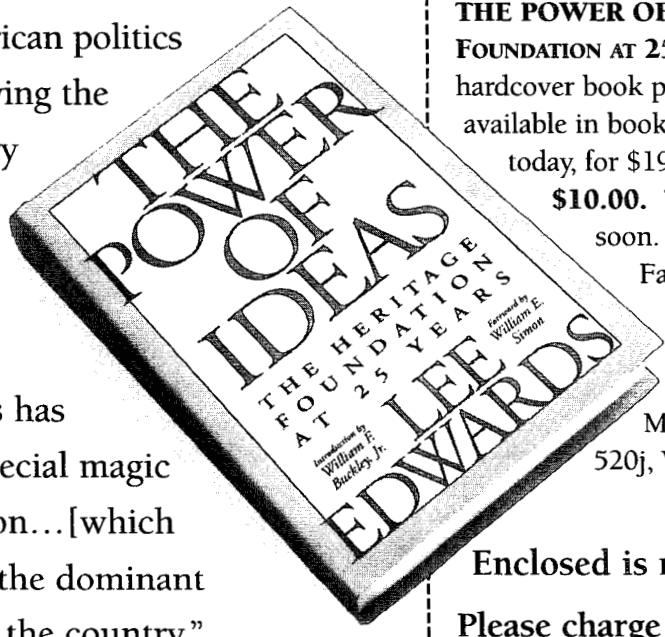

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The New "Massive Resistance"

The Clinton administration defies the Constitution to save racial preferences

By Todd Gaziano

On May 17, 1954, the U.S. Supreme Court ruled in *Brown v. Board of Education* that racially segregated public schools were unconstitutional. The unanimous decision dealt a severe blow to the Jim Crow system of state-sponsored discrimination against blacks and other racial minorities. The Court ruled that separate treatment for people of different races violates the Fourteenth Amendment's guarantee to all Americans of equal protection under the law.

Government officials, who had sworn an oath to uphold the Constitution, should have embraced the *Brown* decision and moved swiftly to end all forms of racial discrimination. But we all know that did not happen. Instead, *Brown* was followed by one of the ugliest episodes in America's painful struggle for civil rights: the South's "massive resistance" to federal court orders ending state-sponsored discrimination. In a nation built upon the rule of law, public officials fought both openly and surreptitiously to preserve unjust and unconstitutional laws and practices. Their refusal to abide by federal court orders denied justice to millions of blacks for decades.

Even as we rejoice that the Jim Crow system is now history, however, the Constitution's guarantee of equal protection is again being violated—this time by government-enforced racial preferences. Racial preferences are not simply a benign policy choice over which reasonable people can differ. Since the mid-1980s, the U.S. Supreme Court has ruled unequivocally that racial classifications or preferences of any kind are equally pernicious no matter which race they are intended to help or harm. All state-sponsored racial preference policies are now presumptively unconstitutional and must be struck down, except in the rarest circumstances.

Instead of embracing these clear court decisions striking down racial preferences, however, a shocking new movement of "massive resistance" has re-emerged in defense of the indefensible. True, few advocates of racial preferences are motivated by bigotry, and they do not resort to violence or physical intimidation to enforce their will. But they are, in some ways, more influential than the leaders of the old massive resistance movement.

Unlike their forebears of the 1950s and 1960s, who were fighting a losing cause against the combined will of the three branches of the federal government, the modern heirs of the new massive resistance *run* the federal bureaucracy and federal law enforcement agencies. In fact, they occupy key civil rights offices of the executive branch as well as the White House itself. And despite court rulings

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to the contrary, they continue to insist that government entities can and should use racial preferences to distribute economic and educational opportunities.

Forty years ago, many Americans felt anger and disgust toward segregationists such as Arkansas governor Orval Faubus who earned their place in history as leaders of the massive resistance to desegregation. Today's massive resistance to racial equality is led by another former governor of Arkansas, Bill Clinton.

Massive Resistance in the Past

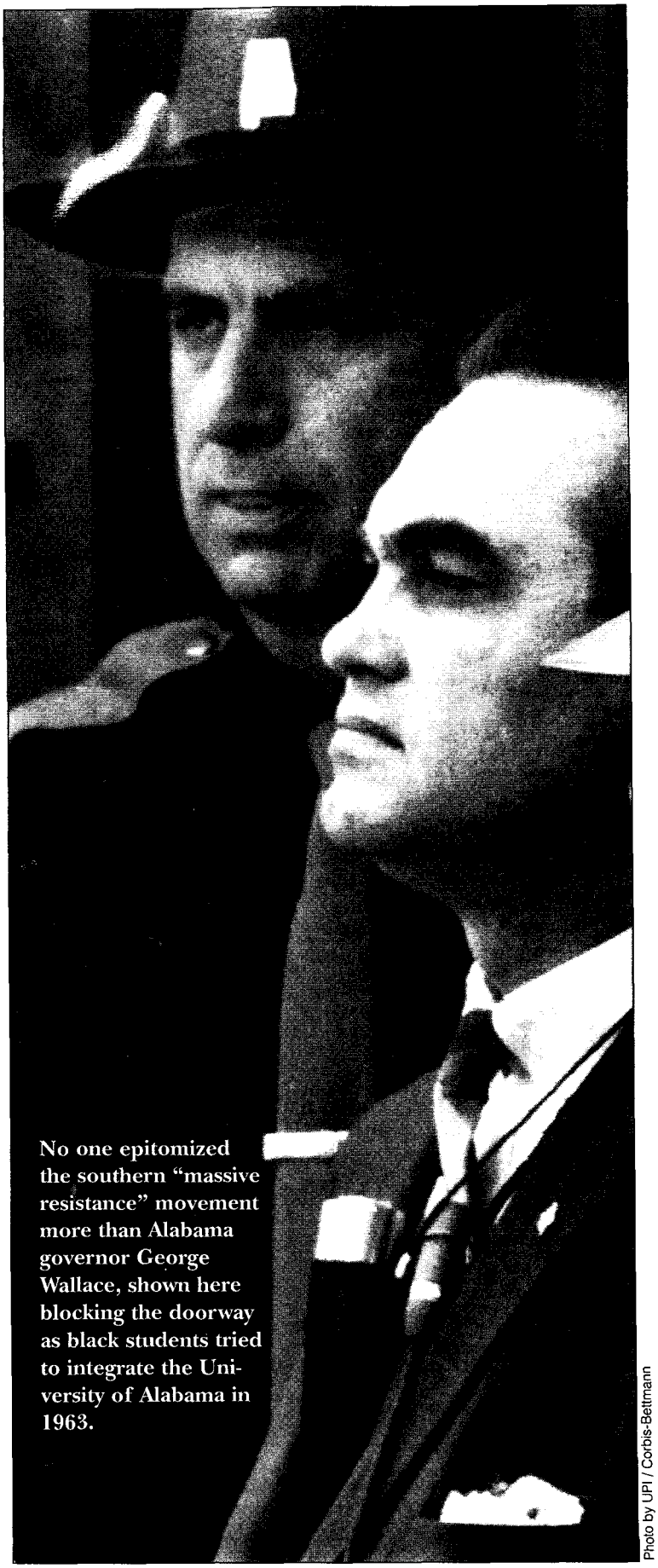
On March 12, 1956, 101 southern members of Congress issued the "Southern Manifesto," which denounced the *Brown* decision. The signatories pledged to resist *Brown* for as long as they could and to use "all lawful means to maintain segregation." They also commended "those states which have declared the intention to resist." Technically, the *Brown* decision applied only to the school boards that were defendants in that case. State and local officials in the South who supported the manifesto refused to follow the Court's ruling in *Brown* and agreed not to desegregate their schools unless and until there was a specific ruling requiring them to do so. They also refused to extend the logical reasoning of *Brown* to any other government facility or service, such as municipal swimming pools or buses.

As historians have noted, the manifesto gave a patina of respectability to massive resistance in the South. In 1957, flanked by the Arkansas National Guard, Governor Faubus stood in the doorway of Little Rock's Central High School to prevent nine black students from attending as ordered by a federal judge. President Dwight Eisenhower had to send federal troops to enforce the court order.

In 1963, during his first inaugural address, Alabama governor George Wallace uttered his infamous cry, "Segregation now, segregation tomorrow, segregation forever." On June 11 of that year, Wallace followed through on his pledge to stand in the entrance of the University of Alabama to prevent two black students from registering for classes. President John F. Kennedy nationalized the Alabama National Guard and dispatched a contingent to make Wallace step aside.

As the federal courts struck down the more overt forms of segregation, southern officials simply devised new means of achieving the same ends. The authors of *Constitutional Law* (1986), a leading constitutional casebook, summarized the discriminatory tactics:

"[T]hroughout the South, school districts devised a bewildering variety of legal strategies designed to slow or stop desegregation. A few communities took the extreme measure of closing their public schools altogether to avoid desegrega-



No one epitomized the southern "massive resistance" movement more than Alabama governor George Wallace, shown here blocking the doorway as black students tried to integrate the University of Alabama in 1963.

Photo by UPI / Corbis-Bettmann

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tion. Others adopted complex pupil placement laws giving local officials discretion to place students in different schools on the basis of supposedly nonracial criteria. Still others utilized 'freedom-of-choice' plans whereby students were assigned to their old schools unless they applied for transfer. The common feature of all these plans was that they produced virtually no actual [change]."

Eventually, violent confrontations backed by these legal delaying tactics helped convince Congress and the public that dramatic federal legislation was necessary. Offended by the massive resistance to the rule of law, Republicans and progressive Democrats joined together to end the longest filibuster in Senate history. In passing the Civil Rights Act of 1964 and the Voting Rights Act of 1965, they aspired to further the Reverend Martin Luther King Jr.'s dream that one day children would "not be judged by the color of their skin but by the content of their character."

A Threat to Equality before the Law

Federal enforcement of the civil rights laws as originally intended played an important role in helping to end state-sponsored race discrimination in this country. But even as resistance to desegregation faded, the goal of equality encountered a new threat: Federal officials themselves gradually subverted the civil rights laws and transformed many of them from a guarantee of equal treatment to a requirement of preferential treatment for members of certain favored races.

Many call this "reverse discrimination," as if it is typically employed to force the perpetrators of past discrimination to compensate their actual victims. In reality, it is the same kind of racial discrimination that the civil rights laws were designed to end. The plain language of these landmark statutes as well as the legislative debates that accompanied them indicate that race-conscious preferences had no place in the enforcement of equal protection. The only way to truly "reverse" government discrimination is to end it against all races.

Some defenders of racial preferences would have us believe that an attack on preferences is an attack on affirmative action. It is worth recalling, however, that the term "affirmative action" originally meant taking positive steps to ensure that discrimination did not take place.

President Kennedy signed the first affirmative action executive order (No. 10,925) in 1961. This order prohibited government contractors from discriminating on the basis of race, creed, color, or national origin, and went on to state: "The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." Early on, federal affirmative action programs largely focused on ensuring that government agencies and contractors enforced the anti-discrimination principles of the civil rights laws.

During the 1970s, however, federal officials began to advance the argument that race-based policies that helped minority races were constitu-

The Court's "Strict Scrutiny"

There are two parts, or "prongs," to the Supreme Court's strict scrutiny test:

1. The program must further a "compelling governmental interest."
Thus far, the Supreme Court majority has only recognized one compelling interest in making racial distinctions: To remedy the present effects of racial discrimination perpetrated by the state actor at issue. Promoting role models is not a compelling governmental interest. Redressing societal discrimination is not a compelling governmental interest. Promoting racial diversity is not a compelling governmental interest.

2. The program must be "narrowly tailored" (using the least intrusive means necessary) to achieve the compelling governmental interest. Assuming that the government entity is trying to remedy its own past discrimination, the following questions are relevant to this part of the test:

- Are there any racially neutral means to redress the past discrimination? Why is rigorous enforcement of the anti-discrimination laws not the solution? Why not simply eliminate all indications of race on the application, bid documents, or other relevant forms?
- Does the program favor an entire race or is it limited to those who actually have been harmed by the prior discrimination? A program that favors an entire race is hardly narrowly tailored. It may reward some who are unworthy (for example, those of privileged background who were never discriminated against) and punish or displace others who were not culpable.
- To what extent does the program impose a burden on persons who are not part of the favored group and who are not personally responsible for the past discrimination?
- Does the program provide benefits to some groups who were not discriminated against in the past by the state actor in question? If so, how can the program be narrowly tailored to remedying past discrimination?
- Is the program administered in a reasonable, evenhanded, and transparent manner? Are relevant records kept? Is the policy written? How is eligibility determined?
- How much weight is given to race? Is it only one factor, and if so, how much of a factor?
- How long has the program gone on? Is it periodically reviewed? Does it have an ending date? If not, how is it remedial in nature?

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tionally distinguishable from policies that were intended to harm minority races. Such programs were defended on the ground that so-called benign preferences favoring minorities should not be subject to the same legal scrutiny as discrimination harming minorities.

Eventually, this perversion of the civil rights laws was itself challenged as a violation of the equal protection guarantee contained in the Fifth and Fourteenth Amendments to the Constitution. In the past 10 years or so, the federal courts have once again returned to the principles of the civil rights era and have largely declared such race-based preferential treatment to be unconstitutional.

The Supreme Court Rides Again

In 1989, the Supreme Court issued a ruling that has since forced defenders of racial preferences into contortions. In *City of Richmond v. J.A. Croson Co.*, a precedent-setting majority said for the first time that all racial preference programs created by state or local governments, no matter whom they are intended to benefit, are presumptively unconstitutional and must be struck down unless they pass the "strict scrutiny" test. The strict scrutiny test is the most exacting judicial inquiry that exists in the law (see box, page 24). Such a searching inquiry is warranted, said the Court, because "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake," (citing *Regents of Univ. of Cal. v. Bakke*, 1978).

The strict scrutiny test requires that any program that makes racial distinctions must be "narrowly tailored"—using the means that are the least intrusive necessary—to achieve a "compelling" governmental interest. That may not seem very tough, but in its application, the Supreme Court has almost never found the government's interest "compelling" enough or its program "narrowly tailored" to such an end. Since the 1940s, not one legislatively or administratively created racial preference program (as opposed to a judicially created remedy) has been upheld by the Supreme Court under that test. The only racially discriminatory action ever upheld under the strict scrutiny test has been the Court's shameful acceptance of the internment of Japanese Americans during World War II.

The meaning of "compelling interest." To date, a majority of the Court has recognized only one governmental interest that is "compelling" enough to justify a racial preference: remedying the current effects of its own past discrimination. The Supreme Court has held that differences caused by general societal discrimination or noninvidious factors, such as economic or educational deficiencies, do not justify governmental discrimination.

Thus studies that purport to show merely that racial disparities exist in certain arenas of life do not justify government-sponsored race preferences. To be legally relevant, the study must show that a government program was discriminatory and that the past discrimination continues to cause racial disparities. Even this finding is not enough to establish a compelling governmental interest in using preferences if other race-neutral means exist to remedy the past discrimination.

In 1978, Justice Lewis Powell suggested in a solo concurrence in *Bakke*, that, although diversity for its own sake is not a sufficient interest to justify racial preferences, obtaining the educational benefits that flow from an ethnically diverse student body might be a sufficient interest. But subsequent Supreme Court cases, including *Croson* and *Wygant v. Jackson Board of Education* (1986) and recent appellate court decisions interpreting them, have rejected Powell's view and have recognized that the only compelling governmental interest in taking race into account is to remedy past government discrimination.

The meaning of "narrowly tailored." Even if the government's interest in racial classifications is a compelling one, it must still show that the challenged program is narrowly tailored to achieve it. Many "affirmative action" programs provide benefits to women and members of newly favored races or ethnic groups that were never subjected to the deprivations of Jim Crow. There can be no *remedial* purpose for preferring, say, Cambodian Americans if the government never discriminated against them. Moreover, the government cannot justify preferring Cambodian immigrants over, say, recent Polish immigrants. Such over- and under-inclusiveness tends to show that there is no close connection between the challenged program and the supposed compelling interest to redress past discrimination, particularly if the preference program is meant to last indefinitely. Thus, few—if any—state preference programs are constitutional.

"Government cannot make us equal," Justice Clarence Thomas wrote. "It can only recognize, respect, and protect us as equal before the law."

In 1995, the Supreme Court ruled in *Adarand Constructors, Inc. v. Peña* that all *federal* preference programs are presumptively unconstitutional also. The Supreme Court ruled that all race-based preference programs, "imposed by whatever federal, state, or local governmental actor," including the highway construction set-aside program at issue in that case, must be struck down unless it passes strict scrutiny. The Court reaffirmed the principle that government discrimination was equally pernicious no matter which race was hurt or helped.

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Although Justice Antonin Scalia voted with the majority, he wrote separately, as if recalling the reaction to *Brown*, that lower federal courts should not have to waste their time ruling the statute unconstitutional in each case. He also wrote that government "can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction. Individuals who have been wronged by [actual] unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or debtor race." Justice Clarence Thomas agreed: "There is a 'moral and constitutional equivalence' between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law."

The New Massive Resistance

After *Adarand*, many legal commentators declared the era of racial preferences effectively over. Instead of ending or changing their racial preference programs to comply with *Croson* and *Adarand*, however, administrators of preference programs and key officials in the U.S. Department of Justice have tried to excuse or justify them. In fact, a new era of massive resistance to the enforcement of equal protection has begun on several fronts:

The Dellinger Memorandum. Within one month after *Adarand* was decided, Walter Dellinger, who was then the Assistant Attorney General for the Office of Legal Counsel, prepared a memorandum for the general counsels of executive branch agencies that set forth a legal strategy

Many of today's rigged preference programs are legally no different than the literacy tests used to prevent blacks from voting during Jim Crow.

that has the effect of circumventing the *Adarand* decision. The Dellinger Memorandum seized on the unremarkable fact that the Supreme Court had not gone so far as to declare all the existing preference programs unconstitutional and had left to the lower courts the task of determining which of them passed strict scrutiny.

The memorandum also emphasized language in Justice O'Connor's opinion that she did not think strict scrutiny was always fatal to preference programs, and that government was not disqualified from acting to redress "the practice and lingering effects of [past] racial discrimination." By emphasizing these points, however, the Dellinger Memorandum attempted to turn the rare exception, where racial classifications might be necessary to redress instances of past governmental discrimination, into the rule.

Finally, the memorandum maintained that promoting diversity might be an acceptable goal if the government had some further objective beyond the achievement of diversity itself. This last notion was based more on wishful thinking than on the law. Although the *Adarand* ruling did not specifically address such a proposition, the Court in *Croson* did say that affirmative action programs must be "strictly reserved" for remedying instances of past discrimination. Dellinger was relying on Justice Powell's 1978 solo concurrence from *Bakke*, but ignored the holding of even that case, which struck down a quota system for admission to the University of California–Davis Medical School.

The "affirmative action review." In due course, the Clinton administration began its review of the approximately 160 federal race-based discrimination programs on the books. The administration then decided to preserve virtually every one, based on its own twisted reading of the *Adarand* opinion. To truly appreciate the breathtaking lawlessness of this action, imagine the public reaction if the Eisenhower administration had declared in 1954, when the Court applied the reasoning of *Brown* to federal schools in the District of Columbia, that racially segregated schools were still permissible in the District.

The administration was forced to drop at least one program—the Pentagon program known as the "rule of two." Under the rule of two, whenever a Pentagon procurement officer could identify two or more qualified minority contractors whose bids were not more than 10 percent above the contract's fair market value, the contract would have to be set aside for bidding exclusively by "disadvantaged" business enterprises. But changes in a small number of other preference programs are analogous to southern school officials' switch from explicit segregation to "neighborhood school plans" in which children were forced to attend the largely segregated schools that happened to be in their neighborhoods. Although some of the changes instituted by the administration in a few of the programs appear to be a step in the right direction, the programs are still far from being constitutional.

Even if Justice Powell's musings in *Bakke* were the governing law, most current preference programs would still be unconstitutional. Many administrators of current affirmative action programs argue that race is only a "plus factor" in their otherwise nondiscriminatory admissions, contracting, and hiring programs. In fact, many race-exclusive preference programs make race an absolute bar. Whites (including refugees from oppressive or discriminatory regimes) simply cannot

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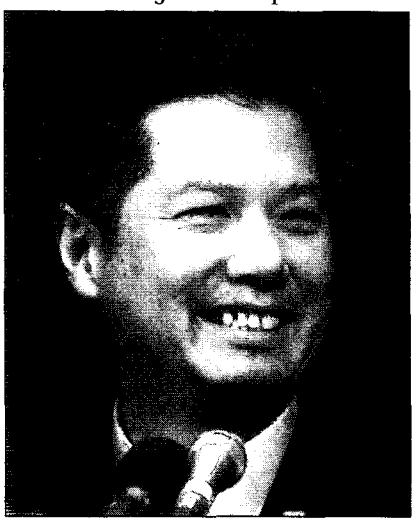
apply. Many other programs claim to have a flexible goal, but a simple regression analysis would show that race is the single most important factor explaining why a large number of minority applicants are accorded the favorable outcome over applicants from nonfavored races. Grandfather clauses and literacy tests, though facially neutral, were similarly used to prevent minority voting during Jim Crow. Many of today's rigged preference programs are legally no different.

Bill Lann Lee. In 1997, the administration nominated civil rights activist Bill Lann Lee to head the Justice Department's civil rights division. When Lee was asked during his Senate confirmation hearing to submit a list of the existing 160 or so federal preference programs that did not pass strict scrutiny, he said he could not name one. Since no racial preference program has passed that test in 50 years, the notion that all of them pass muster is absurd.



Bill Lann Lee, the president's nominee for a top civil rights post, gave a creative interpretation of Supreme Court precedent at his confirmation hearing.

Lee simply dismisses the Supreme Court decisions he does not like with implausible or creative interpretations. As the western regional director of the NAACP Legal Defense Fund in 1989, he demonstrated a willingness to circumvent the Court's decision in *Croson.* In fact, he wrote an op-ed in the *Los Angeles Times* on why others should do the same. Lee's stated purpose was to convince public officials that *Croson* did not affect their programs and that they should continue what they had been doing.

In 1997, during his testimony before the Senate Judiciary Committee, Lee summarized the holding of *Adarand* as follows: Racial preference programs "can be appropriate if they are conducted in a limited and measured manner." But the principal holding of *Adarand* is that all racial preference programs are presumptively unconstitutional and that the rare exception must satisfy an exceedingly difficult and searching test. Lee surely knew this. "Limited and measured" is not a judicial standard; it means whatever Lee wants it to mean. It is not the same as being "narrowly tailored" (as that term has come to be defined in the law) to further a "compelling governmental interest." The Judiciary Committee was aghast at Lee's misstatement of *Adarand,* and even liberal journalists wrote that Lee's interpretation of *Adarand* turned the opinion on its head.

The Judiciary Committee refused to recommend his appointment, largely because of his seeming refusal or inability to apply *Adarand* faithfully. But President Clinton attempted to make Lee the acting head of the civil rights division anyway, where he remains today. This insult to the Senate's prerogative of advise and consent is even more remarkable because legal scholars have concluded that the acting appointment violates the Vacancies Act.

Highway set-asides. The Clinton administration continues to defend the very highway construction set-aside at issue in *Adarand,* despite the fact that every federal court that has considered the set-aside has declared it unconstitutional. At a hearing before the Senate Subcommittee on the Constitution in September 1997, Senator John Ashcroft asked the general counsel of the Department of Transportation how many federal courts would have to rule that this program was unconstitutional before the executive branch would obey the law. The general counsel replied essentially that unless the Supreme Court ruled definitively a second time that the program was unconstitutional, the administration would not accept the opinion of any lower federal courts. So far, the administration has been true to its word. It has refused to follow any of the lower federal court opinions striking down the set-aside, preferring instead to appeal every losing decision.

This tactic of appealing every adverse decision to the Supreme Court and refusing to faithfully apply Supreme Court rulings is reminiscent of the resistance strategy articulated in the Southern Manifesto. The Dellinger Memorandum, the administration's insistence that virtually all 160 federal preference programs are legal, and President Clinton's appointment of Bill Lann Lee to the Justice Department's civil rights division are to the same end. The game played by southern school officials, mayors, and governors throughout the 1950s and 1960s is now being played by the federal preference apologists who refuse to give effect to the *Croson* and *Adarand* decisions. This also gives cover to state officials who want to continue their racial preference policies.

Turning the Screws

Administration officials have also worked with other entities to undermine landmark decisions by the federal appellate courts:

Race-based scholarships. In *Podberesky v. Kirwan* (1992), the Fourth Circuit Court of Appeals struck down a race-based scholarship program at the University of Maryland. Instead of embracing a decision that promotes equality under the law, the general counsel of the U.S. Department of Education warned all colleges and universities not to revise "race-targeted aid programs." Unlike the Dellinger

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Memorandum, the general counsel's letter came with an implied threat that colleges and universities could lose federal funding if they complied with the *Podberesky* decision.

Racial preferences in university admissions. In *Hopwood v. Texas* (1996), the Fifth Circuit Court of Appeals struck down the use of "diversity" as a rationale for considering race in college admissions, and ruled that the University of Texas Law School could not use race at all as a factor in its admissions decisions. The Justice Department filed a brief asking the Supreme Court to overturn the decision. Norma Cantu, who heads the Office of Civil Rights at the U.S. Department of Education, went much further: She demanded that Texas disobey the court order. Despite the plain language of the opinion that prohibited race from being considered at all, she argued that the decision did not invalidate all racial preferences at the University of Texas or elsewhere, but only forbade the precise practices that were previously employed.

The Clinton administration has been on the losing side of every major court ruling on equal protection.

When the Supreme Court allowed the *Hopwood* opinion to stand without comment, Cantu put Texas in a bind. She threatened to withdraw $500 million in education federal funds if the state complied with the then-final court order. The U.S. Department of Transportation had issued a similar threat to the Metropolitan Transportation Authority of Houston after a federal district court had enjoined Houston from enforcing the federal set-aside program at issue in *Adarand*.

In the standoff with Cantu, the public rebuke of the administration's position was so strong that Walter Dellinger, who by then had become Acting U.S. Solicitor General, announced that Texas could follow the Fifth Circuit's order after all. The message to other colleges and universities was clear, however: Unless they litigated their preference programs all the way to the Supreme Court, they could not abandon them without incurring the administration's wrath.

Racial preferences in hiring—and firing. In 1988, the school board in Piscataway, New Jersey, had to lay off one of two female teachers that it claimed were exactly equal in seniority and other qualifications—except that one was white and the other was black. Instead of drawing lots, the board terminated the white teacher in order to preserve racial diversity within the school's faculty. During the Bush administration, the Justice Department filed suit on behalf of the dismissed teacher, Sharon Taxman, who won in federal district court in 1993. On appeal, Deval Patrick, Clinton's Assistant Attorney General for Civil Rights, withdrew the department's representation of Taxman and sought to intervene on behalf of the school district. But the Third Circuit affirmed that racial diversity did not constitute a sufficient interest under Title VII to justify a race-conscious action.

After the Supreme Court decided in 1997 to hear the appeal in *Taxman v. Piscataway*, preference apologists decided that they could not let the Supreme Court hand them another crushing defeat. A coalition of civil rights groups, who had approved of Taxman's layoff for years, led the effort to collect $433,500 to pay Taxman to settle the case. This use of hush money to strip the federal courts of precedent-setting jurisdiction is a novel tactic. Proponents of preferences have perfected the art of ignoring or avoiding lower court opinions they do not like. The force of repeated Supreme Court decisions is harder to deal with. If preference advocates can force every victim of discrimination to litigate all the way to the Supreme Court and then settle with the rare few who make it, they can perpetuate their system much longer. What if the segregationists had done that with Linda Brown and every subsequent school desegregation plaintiff whose lawsuit reached the Supreme Court? Thankfully, the segregationists did not have the imagination of today's preference advocates.

Massive Resistance in the States

Unfortunately, many state officials have followed the lead of the federal government. In Texas, university officials initially denounced the federal appellate court decision in *Hopwood v. Texas*. Even now, Texas officials are implementing a number of questionable changes in admission and scholarship rules to try to achieve the same racial results. And President Clinton has pledged to help these efforts.

In a 1997 speech to black journalists, President Clinton pledged to try to "come up with some more funds and some more [race-]specific scholarship programs to try to overcome" *Hopwood*. This tactic is clearly unconstitutional under the Fourth Circuit's *Podberesky* decision. It is also reminiscent of the scheme some communities concocted in the 1960s when they purported to use private money to start supposedly private schools with state support, a scheme that the Supreme Court ultimately struck down on equal-protection grounds.

In California, various federal, state, and local officials have pledged to fight the implementation of Proposition 209, which California voters passed last year to end state preferences on the basis of race, ethnicity, and sex. The first tactic of state activists, including at that time Bill Lann Lee, was to file a suit arguing that Proposition 209 violated the Fourteenth Amendment. In essence, Lee and the others

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argued that the Equal Protection Clause often requires "unequal" or preferential treatment.

This interpretation of the Fourteenth Amendment is so far out of the mainstream that it turns the Amendment on its head. Accordingly, a unanimous panel of the Ninth Circuit Court rejected the challenge in one of the most strongly-worded opinions in recent years. In a 1997 ruling, the court said that it would be "paradoxical to conclude that by adopting the equal protection clause of the Fourteenth Amendment, the voters of the state thereby had violated it." The appeals court also said, "There is simply no doubt that Proposition 209 is constitutional. . . . After all, the 'goal' of the Fourteenth Amendment, 'to which the Nation continues to aspire,' is 'a political system in which race no longer matters.' " On November 3, 1997, the Supreme Court made that opinion final when it refused to review the decision.

But the opponents of Proposition 209 did not give up; they simply switched tactics. Local California officials vowed to fight implementation of the initiative. The vice mayor of Oakland promised to "chip away" at 209 until its effectiveness is negated. San Francisco mayor Willie Brown refused to alter his city's affirmative action programs in light of Proposition 209. He now claims that the City of San Francisco has never given any preferential treatment to minorities, and therefore need not change a thing. A Los Angeles County affirmative action officer admitted to *USA Today* that "I am very defiant when it comes to something that had no business being voted on."

The federal government is lending a helping hand to local California officials who want to thwart Proposition 209. Norma Cantu, the head of the Office of Civil Rights (OCR), has begun an investigation of California law schools, at the request of groups who were opposed to Proposition 209, to determine whether the elimination of racial preferences violates federal education and employment laws.

The OCR investigation is premised in part on the notion that Title VI of the Civil Rights Act may forbid the use of standardized test scores unless they result in proportional racial admissions. UCLA Law School dean Michael Rappaport, who was not a supporter of Proposition 209, is dumbfounded by this theory, which he says amounts to the suggestion that "an academic institution can't use academic criteria when evaluating candidates for its academic programs." Investigations like the one Cantu has launched in California pressure many colleges and universities to continue their racially discriminatory admissions programs.

The Day of Reckoning

The defiant attitude of the L.A. County affirmative action officer betrays a certain desperation. The school board in Piscataway, New Jersey, was just as defiant up until the day it chipped in money to settle the Taxman wrongful-termination case and prevented the Supreme Court from issuing a ruling. Public officials and countless "affirmative action" administrators in other states are engaged in similar desperate behavior in an attempt to preserve their racially discriminatory programs. Well intentioned or not, however, these programs are nearing their day of reckoning.

The American people have a right to insist that civil rights officials be forceful advocates of equal treatment under the law and not participants in a new massive resistance to the rule of law. Yet, in so many ways, executive branch officials have opposed or resisted the courts' equal protection decisions. That does not mean there are no open questions in the law of affirmative action, but the Clinton administration has been on the losing side of every major court ruling. Most programs that are pushed by federal civil rights officials involve quotas and set-asides, pernicious presumptions, test "norming," blatant double standards, and other elements that are so far from constitutional that even a relaxed reading of *Croson* and *Adarand* would invalidate them.

Eventually, the federal courts became frustrated with the massive resistance in the South and resorted to taking over and running many public facilities. Although this type of judicial activism, which usurps the democratic powers of the political branches, may have been necessary to combat the evil of that time, it created problems of its own. Not only were courts ill suited to micromanaging schools, bus schedules, and other public facilities, but the judicially enforced mandates engendered more bitterness, resentment, and polarization of the races than would have resulted if the elected officials had accepted the courts' early decisions and moved swiftly to implement them. It took the federal courts up to 20 years to desegregate the South after the *Brown* decision, but the federal courts are now more used to exercising extraordinary powers.

The Education Department seems to believe, says one law school dean, that "an academic institution can't use academic criteria" when evaluating applicants.

It would be tragic for our country, indeed, if the new resistance leaders of our age prolonged and deepened the pain of racial inequity, only to force the federal courts once again to impose their own remedies.

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I'll Stand Bayou

Louisiana couples choose a more muscular marriage contract

By Joe Loconte

The pipe organ at the First Baptist Church in Robert, Louisiana, erupts into "The Wedding March." The bride, Erlene Thompson, is a little nervous. She need not be: She has known the gray-haired groom for most of her life. More precisely, she has been married to John Thompson for the last 37 years. Together they have raised four children, who have given them eight grandchildren and one great-grandchild—an infant boy whom Erlene cradles in her arms as she steps down the aisle. "The vows this time were a lot more meaningful to both of us," she says later. "It just runs much, much deeper."

The Thompsons, however, didn't just renew their vows. They rewrote them, based on the state's new, tough-minded marriage law. Following a brief ceremony, they and more than two dozen other couples from their church signed a legally binding agreement, witnessed by a state notary, pledging "to take all reasonable efforts" to preserve their marriage unto death. "We wanted to be an example for our children and their children," she says afterward, "that no matter what kind of troubles and trials you have, you can weather them."

The Louisiana Covenant Marriage Act, passed into law last August, remains controversial, and with good reason: It is the first experiment in raising both the entrance and exit requirements for marriage since the no-fault divorce revolution began in the 1970s. On the front end, it requires premarital counseling. On the back end, it limits the legal grounds for divorce to adultery, felony conviction, abandonment, physical or sexual abuse, or separation of at least two years. It also requires that struggling couples get counseling before they may call it quits.

Here's the part that puts choice-loving liberals in a quandary: The covenant contract is purely optional. By leaving the existing no-fault regime untouched, Louisiana has created the nation's first two-tier marriage system. The message to couples contemplating the strength of their marital commitment: you choose—decaf or double espresso.

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Barbs have come from all sides, from conservatives worried about "intrusive" government to feminists fearful of women being "trapped" in bad marriages. Skeptics point out that so far only a small number of newlyweds have chosen the covenant option. Others complain that it still offers couples a generous escape clause.

All of this misses the most remarkable aspect of the Louisiana effort: In a culture that disposes of commitments as easily as paper cups, the very existence of a more muscular marital contract can help redefine attitudes toward marriage.

"Law is a wonderfully powerful symbol of what we hold as important," says Steven Nock, a University of Virginia sociologist studying the impact of the Louisiana law. "The public discussion that covenant marriage already has provoked is a very healthy sign." Private discussions are important as well. Says Louisiana state representative Tony Perkins, who sponsored the legislation, "Some couples may have their first and last argument over which type of marriage to choose."

Hundreds of congregations throughout the state have called Perkins's office to request information on the law. Leaders of entire denominations, from the Catholic Church to the Assemblies of God, are considering whether to endorse the idea. Many married couples already have: Over the last six months, thousands have converted to covenant arrangements. Thousands more are expected to follow suit in June in ceremonies across the state. Meanwhile, legislatures in nearly two dozen states are considering covenant-style reforms.

With little practical support, covenant advocates are persuading much of the state's religious community—and many outside it—to rethink their entire approach to shoring up marriage in America. "Law can change incentives, and incentives can shape behavior," writes William Galston, a former domestic policy adviser to President Clinton. "It is amazing how many people who believe (rightly) that civil rights laws helped change racial attitudes deny that any such consequences can flow from changes in the laws of marriage and divorce." Though less than a year old, the Louisiana statute already offers both liberals and conservatives an object lesson that law can be used to instigate, but not compel, traditional virtue.

Last, Best Hope for Marriage

Religious leaders will be vital to this effort. Eighty percent of all marriages still take place in churches and synagogues. That makes the religious community, as one pastor puts it, "the last, best hope" for the recovery of marriage in America. No other institution has the moral authority to challenge men and women to make the commitments necessary for sustaining marriage. "Too many people want to use the church as a nice, pretty building to get married in," says Louis Husser, the pastor of the First Baptist Church of Robert. "That's not the way to help people over the long term."

Husser photo by Thomas Roddy Poole; Rodgers photo courtesy of Ted Long

Louis Husser, the pastor of the First Baptist Church of Robert, and his wife, Charlotte (above), set an example for his congregation by converting to covenant marriage. Newlyweds like Robyn Rodgers (right) and her husband, Bryan, who were recently married by her father, believe covenant marriage offers them "an added sense of security."

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As with every other issue in the nation's culture war, the covenant concept inspires handwringing as well as hallelujahs among religious leaders. Bishop Charles Jenkins, the leader of the Episcopal Church in Louisiana, reversed his predecessor's endorsement of the plan, warning that "it goes back to the bad old days" of fault-based divorce. Bishop Dan Solomon, the highest-ranking official of the United Methodist Church in Louisiana, has dismissed the law as "a denigration of marriage vows long held and faithfully honored."

The Catholic Church, the spiritual home of a third of churchgoing Louisianans, is still mulling over its position. The state's Catholic bishops praised the legislature's "commendable concern" for strengthening marriage. But they have stopped short of endorsing covenant marriage over the state's easy-exit licenses.

Catholic officials are unhappy with the law's requirement that engaged couples receive premarital counseling about the new conditions for divorce. Any discussion of divorce before marriage is anathema to Catholic doctrine and would "confuse or obscure" church teaching, the bishops say. The state's seven dioceses are now reviewing proposed amendments to the law that attempt to address the counseling question.

Despite these setbacks, covenant marriage is being embraced by a growing number of conservative Protestant groups. It has gained the tacit endorsement of the Southern Baptists, the state's second-largest religious body after the Catholic Church. In a resolution that received unanimous approval, the Louisiana Baptist Convention praised the new policy as an attempt "to move the legal standards for marriage and divorce closer to the standards of the Word of God." Earlier this year, 150 Protestant pastors and their wives met in Baton Rouge to convert their own unions to covenant marriages. About 300 evangelical churches invited couples in their congregations to do the same on Valentine's Day.

Meanwhile, the Christian Coalition is instructing its state chairmen to make passage of similar measures one of their top legislative priorities. Evangelical Protestant leader James Dobson, whose Colorado-based Focus on the Family radio program reaches at least 3 million listeners a day, is also on board. "This is an idea whose time has come," Dobson said in a recent broadcast. "We're going to do everything we can to support covenant marriage."

Taking a Stand

After a slow start, Louisiana couples are steadily warming to the concept. Though only a few hundred newlyweds have chosen covenant marriage, state officials say that perhaps 3,000 married couples have upgraded their nuptials. At the First Presbyterian Church in Baton Rouge, about 60 couples signed covenant agreements in a single weekend. At Glad Tidings, an Assembly of God church in Lake Charles, 240 did so. And at a ceremony held by a large evangelical church outside Baton Rouge, 500 couples recently underwent a covenant conversion.

These just may be the stirrings of a sleeping

Breaking the Covenant

Louisiana's covenant marriage law raises the requirements for ending a marriage. The grounds for legal separation and divorce follow:

Legal Separation in a Covenant Marriage

In order to obtain a legal separation (which is not a divorce and therefore does not end the marriage), a spouse to a covenant marriage must first obtain counseling and then must prove:

- Adultery by the other spouse;
- commission of a felony by the other spouse and a sentence of imprisonment at hard labor or death;
- abandonment by the other spouse for one year;
- physical or sexual abuse of the spouse or of a child of either spouse;
- the spouses have lived separate and apart for two years; or
- habitual intemperance (for example, alcohol or drug abuse), cruel treatment, or severe ill treatment by the other spouse.

Divorce in a Covenant Marriage

A marriage that is not a covenant marriage may be ended by divorce more easily than a covenant marriage. In a marriage that is not a covenant marriage, a spouse may get a divorce for adultery by the other spouse, conviction of a felony by the other spouse and his imprisonment at hard labor or death, or by proof that the spouses have lived separate and apart for six months before or after filing for divorce. In a covenant marriage, a spouse may get a divorce *only* after receiving counseling and may *only* get a divorce for the following reasons:

- Adultery by the other spouse;
- commission of a felony by the other spouse and sentence of imprisonment at hard labor or death;
- abandonment by the other spouse for one year;
- physical or sexual abuse of the spouse or of a child of either spouse;
- the spouses have lived separate and apart for two years; or
- the spouses are judicially or legally separated and have lived separate and apart since the legal separation for one year and six months, if there is a minor child or children of the marriage; one year, if the separation was granted for abuse of a child or of either spouse; or one year in all other cases.

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giant. Church leaders are increasingly ready to declare their congregations "no-fault-free" zones: Many are refusing to marry couples who fail to choose the covenant contract.

The Bethany World Prayer Center in Baker, with an average weekend attendance of nearly 6,000, is one of the largest congregations in Louisiana. Pastor Ted Long and his staff quickly decided to require covenant marriage contracts; none of his 22-member pastoral staff will marry couples without one. Robyn Rodgers, Long's daughter, was the first to be married at Bethany under the new regime. "It really gives an added sense of security," Rodgers says. "We know that if we have problems, we can't just say 'I'm leaving.'"

The district board of the Assemblies of God, representing 238 churches across the state, is expected to recommend that all its pastors say "no" to no-fault unions. Congregations would be free to follow their own course, but the Reverend John Bosman, a denominational leader, calls the board's decision "a very strong statement." As this issue went to press, denominational officials were planning an April ceremony in which about 300 church delegates will convert their marriages to covenant agreements.

Pastors and parishioners alike stress the importance of setting an example of strong marriages for other couples and their families. At numerous ceremonies around the state, couples converting to covenant unions celebrate amid throngs of children. "Example is extremely important," says Stuart Lankford, an associate pastor at Glad Tidings. "It will cause couples to think more seriously about what they're getting ready to do."

Sociologists tend to agree. They say people rarely change their behaviors simply in response to a law or public pronouncement. "People typically take their cues from those they know and trust," says Nock of the University of Virginia. "With more role models and public examples, the law's standard is likely to gradually seep into the public consciousness."

Why Counseling Is Not Optional

Making a lifelong commitment is one thing, of course. Keeping it often requires help. Supporters say one of the law's most important dictates is that struggling couples must agree to counseling before they can take steps toward dissolving their union.

That makes perfect sense to the leaders at First Presbyterian in Baton Rouge, which now marries only covenant couples. The 1,600-member church has long offered a meaty premarital counseling regimen. Couples are required to give 90 days' notice before their wedding day, meet several times with a pastor, attend a day-long engagement seminar, fill out a compatibility questionnaire, and discuss the results with a church counselor.

The law's requirement that couples considering divorce must first seek help gives pastors even more leverage. "We can do the front-end stuff, but not the back-end stuff," Stevenson says. "When a couple really is having problems, you can't make them get counseling. But the law influences them." Bethany's Ted Long agrees: "Men are notoriously resistant to counseling. But the force of law means they are going to have to sit down and get some help."

People can choose either religious or secular mediators, but either way they'll be read the riot act. The law obligates them to talk frankly about their marital responsibilities as spelled out in their marriage license and in the Marriage Covenant Act, a pamphlet prepared by the state's attorney general.

Some newlyweds are, in fact, banking on tough medicine to help get them through the hard times. Ben and Jennifer Ramagos-Young had both been married and divorced before they met.

More clergy are declaring their congregations "no-fault-free" zones, refusing to marry any couples who don't choose the covenant contract.

When Jennifer told her attorney she was getting married again, this time under the covenant contract, the attorney tried to talk her out of it. But Jennifer insisted. "Slowing things down," she says, "will allow us to get the counseling we both may need before we make a rash decision." Buying time is often exactly what marriages in crisis need: better for couples to be talking, even through clenched teeth, than consulting with divorce lawyers.

Under the new law, an abused spouse can still escape the relationship with relative ease. But for couples simply drifting apart, the law's two-year waiting period—rather than six months under no-fault—gives them a chance to work things out. "We're not erecting a barricade," Perkins says. "We're just putting in some speed bumps."

Studies show that couples who undergo counseling are likely to navigate the storms of conflict and stay afloat. Psychology professor Howard Markman has summarized 17 studies of the impact of counseling on marital satisfaction. He found that nearly three out of four distressed couples who got help reported significant improvement in their relationships. Markman, a professor at the University of Denver, says that "for couples who want to work on their relationship, there is no reason why the marriage can't be saved."

If Markman is right, then divorce may be avoidable far more often than we think. For one thing, most breakups are not driven by extreme abuse:

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About two-thirds result from "low-level conflict" in which couples slowly drift apart. Second, in most cases the decision to separate is not mutual. According to family scholars Frank Furstenberg and Andrew Cherlin, four out of five divorces occur despite the objections of one partner. Herma Hill Kay, a principal backer of California's no-fault divorce legislation in 1969, later offered a mournful observation on marital meltdowns: "Divorce by unilateral fiat is closer to desertion than to mutual separation."

All of this suggests that the key to rescuing failing marriages is to address issues of commitment and character, a process best tackled with extended, roll-up-your-sleeves counseling. No-fault divorce short-circuits this process. "The present divorce law is something we as pastors fight, because there isn't enough time to help people," Stevenson says. "It drains away the motivation of counseling, because the back door is wide open and people are ready to rush out."

Finding Fault

The most controversial part of the Louisiana experiment is its return to a fault-based system for divorce—the same system discarded by the no-fault revolution. Critics claim that reintroducing fault would only fuel hostilities in failing marriages. But others point out that fault has not really disappeared from divorce proceedings, it just insinuates itself into battles over alimony payments, division of property, and child custody.

More importantly, they say, divorce laws ought to contain notions of objective fault to signal society's disapproval of certain kinds of behavior. "Collective condemnation of reprehensible acts is powerful and should occur," says Katherine Spaht, a law professor at Louisiana State University who helped craft the legislation. "Guilt and shame, if our society can restore it, often controls human behavior."

Maggie Gallagher, the author of *The Abolition of Marriage,* suggests that no-fault laws may even increase the likelihood of domestic violence by failing to identify and punish men financially for their marital crimes. Domestic violence is a clear ground for divorce under covenant marriage—a first for Louisiana law. "There is plenty of abuse and adultery out there," says Stevenson, a pastor for 36 years. "Couples deal much more realistically with their lives when they face the issue of fault where it can be identified."

The Law as Tutor

Feminists and other no-fault defenders argue it is a mistake to blame divorce laws for failed marriages. But pastors in the trenches of marital counseling say the message and mechanism of no-fault make it much harder to hold couples together. "They should crawl out from under their rocks and get in the real world where people are struggling," says Louis Husser, a Baptist pastor for 23 years. "No-fault has created a test-drive mentality."

Lawmakers and nationwide want more couples to close the deal—and keep it closed. At least 24 states are considering covenant marriage legislation. "When you make a commitment of this nature, you need to back it up with something," says Arizona state senator David Petersen, who is pushing a covenant bill. In Alabama, the house of delegates has approved a similar measure. "The state's role is to establish legal protections for an institution that God created," says Stan Watson, the director of research at the Alabama Family Council, which helped draft the legislation. Oklahoma state representative Jim Reese secured 52 co-authors for his bill, which passed the house 90 to 6. Reese says it is his "top priority" to publicly raise the bar for marriage through covenant-style reform.

The law as moral tutor—the very concept tends to make both liberals and libertarians shudder. Yet it is the premise underlying the covenant experiment. Says Spaht, "We're not all going to make it, but not having any ideal in the law lowers the standard." Or to cite an old Chinese proverb: He who aims at nothing hits it.

"The story about marriage contained in the law—of marriage as a temporary bond sustained by mutual emotion alone—is becoming the dominant story we tell about marriage in America," writes Gallagher in the religious journal *First Things.* The problem with this story is that it usually contains an unhappy ending: More than half of all new marriages in the United States will end in divorce or permanent separation, and most will involve minor children.

Covenant marriage uses both law and civil society to confront couples with the nature of their commitment.

Must we settle for such failure and all the social consequences that go along with it? Must it be no-fault or nothing?

Covenant marriage uses both law and civil society to confront couples with the nature of their marriage commitment. Such confrontation could help rewrite our nation's most troubling cultural tale. "Everybody now, as a result of the law, will be forced to make a decision," Nock says. "How they resolve that is going to be very interesting."

Joe Loconte *is the deputy editor of* Policy Review: The Journal of American Citizenship *and the author of* Seducing the Samaritan: How Government Contracts Are Reshaping Social Services *(Boston: Pioneer Institute, 1997).*

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Learn While You Earn

Q: What conservative idea advances tax reform, helps families, and counters Clintonian politics?
A: Education savings accounts

By John Hood

Just when conservatives started to believe that serious tax reform was gaining momentum, along comes the 1997 budget deal between President Clinton and the Republican Congress. The deal not only overlooked the whole debate over reshaping our complicated and inefficient tax code, but it also created a bewildering array of new tax provisions. Worst of all, Clinton managed to enact his flawed pet proposals for education tax breaks. By effectively marrying tax relief to the issue of education, Clinton advanced a traditionally Democratic issue while making inroads into a core Republican cause.

But this need not be the political masterstroke it appears. In fact, the president's tactics have left him open to a counterproposal that benefits education far more while advancing legitimate tax reform. Clinton has essentially endorsed tax deductions or credits to defray expenses for both preschool and higher education. He now has no principled objection to giving similar tax treatment to a family's investment in elementary and secondary education.

Conservatives should propose tax deductibility for educational expenses and savings across the board, in the form of an expanded, tax-free educational savings account. This will cut taxes on families with children (a key voting constituency), promote parental choice and competition (a key conservative policy goal), and advance fundamental tax reform by treating education as an investment in human capital. More so than other ideas currently on the table—like eliminating the marriage penalty or expanding capital gains relief—tax-deductible ESAs combine free-market principles with political appeal. Those who seek both to reduce taxation and introduce market competition into education—policies of real value to American families—should seize this opportunity to fight for educational tax relief of their own.

Seizing an Opportunity

The various educational tax cuts in the 1997 deal are projected to yield nearly $40 billion over five years by 2002. The best known is probably Clinton's proposal to create $1,500 educational tax credits, called "HOPE Scholarships." This program was roundly and rightly condemned as poorly drafted and targeted. For one thing, the $1,500 tax credits, available only for college, are likely to fuel tuition inflation. If past experience with tax breaks and federal student loans is any guide, colleges will soon raise tuition fees to capture at least some of the increased buying power of parents.

Other aspects of the tax package drew less attention. These included new rules allowing with-

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drawals from individual retirement accounts (IRAs) for education, medical care, and homebuying, and the creation of educational savings accounts (ESAs), into which parents can deposit up to $500 a year and see earnings compound tax-free until the money is withdrawn for college expenses. None of these proposals saves families much money, and, in the case of IRAs, penalty-free withdrawals for college expenses come at the expense of retirement savings.

Recognizing a good opportunity, U.S. Senator Paul Coverdell last summer proposed an amendment to the budget deal that would have allowed withdrawals from these ESAs for K-12 educational expenses as well as for higher education. In June 1997, the Senate approved Coverdell's amendment, but Clinton squelched it by threatening to veto the entire deal.

The new "A+ Accounts," as these ESAs for K-12 education are called, would have allowed annual deposits of up to $500 per child and exempted earnings from taxes, just like ESAs for college. In October, Representative Bill Archer, the chairman of the House Ways and Means Committee, introduced a similar bill with an annual deposit cap of $2,500. It passed the House but died in the Senate in late 1997.

Coverdell has re-introduced the expanded ESA this year, with an annual cap of $2,000 per child. It's a great first step. But it doesn't go nearly far enough. The deposits themselves, not just the earnings on them, should be tax-deductible. This would not only make ESAs far more valuable to parents, but would simultaneously promote parental choice in education to a large degree as well as advance the cause of principled tax reform. Here's why.

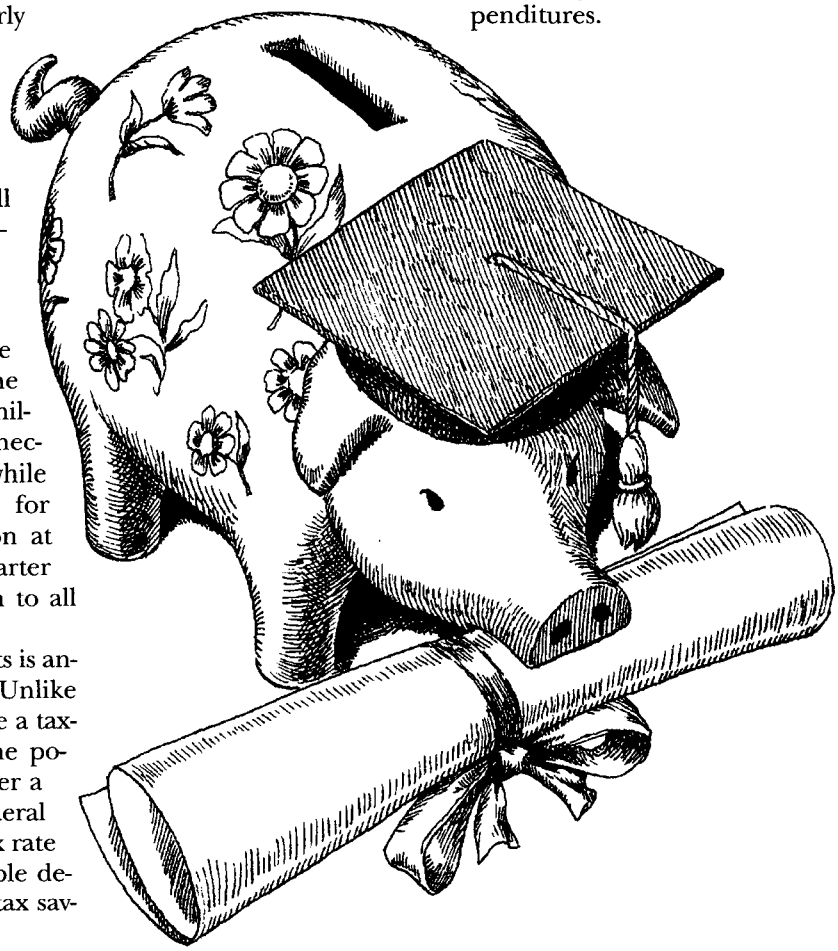
Taxes and Parental Choice

A growing chorus of Americans believe that choice and competition improve the quality of education available to their children. To agree on the goal, however, is not necessarily to agree on means. For example, while conservatives have long favored vouchers for promoting parental choice, the real action at the state level in recent years has been charter schools—independent public schools open to all families that want to apply.

The tax-free educational savings accounts is another useful tool for promoting choice. Unlike vouchers, deductible ESAs do not constitute a taxpayer subsidy for private education, yet the potential for tax savings is significant. Consider a middle-income family paying a marginal federal tax rate of 28 percent and a state income tax rate of 7 percent. An ESA allowing tax-deductible deposits of up to $2,500 a year would yield a tax savings of $875—not counting any tax-free earnings on unspent funds. According to the U.S. Department of Education, the average U.S. private elementary school costs a little more than $2,000 a year, and the average private secondary school costs about $4,500. So the annual tax savings per child amounts to between 20 percent and 44 percent of average private-school tuition, depending on the grade.

If families start saving early, the nest egg relative to expenses grows even greater. Parents making annual deposits from the birth of their child would reap tax savings, including the windfall from tax-free earnings on principal, during the child's first 18 years equal to more than half the cost of the average private K-12 education. The A+ Account, by contrast, would yield tax savings only on accrued earnings in the ESA, a mere fraction of the benefit.

ESAs are also a much easier sell politically than vouchers or tuition tax credits. In a poll of 500 North Carolina voters commissioned by the John Locke Foundation last year, 77 percent supported tax deductions versus 56 percent supporting school vouchers. In a separate survey of school board members across the state, we found that 63 percent opposed vouchers or tuition tax credits but 59 percent supported tax deductions for educational savings and expenditures.



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Taxes and Educational Investment

Tax-free ESAs are also consistent with sound tax policy. A core principle of sound policy is that all income should be taxed only once. Taxes on investments violate this principle. When individuals or firms are forced to pay income taxes on money that is invested in, say, a new computer or a new factory, and then taxed on the increased earnings that the investment generates, that constitutes double taxation. Income earned in the future, through investment in some form of income-enhancing capital, will face a higher real tax rate than income earned and consumed today.

The tax code already combats double taxation when it comes to investments in physical capital. A business can write off the purchase of computers or factories. A self-employed person can write off the expenses of a home office. Workers can write off the cost of any uniforms that they must purchase for work. These are examples of tax neutrality in action. Similarly, some business investments in human capital—in employee training, for example, or employer-paid tuition—are partially or fully tax-deductible. They increase the earnings potential of the firm or worker, and thus will be taxed as income in subsequent years as the firm or workers brings in more revenue.

Furthermore, even some private investments in human capital receive neutral tax treatment. Many families are eligible for federal and state tax deductions for preschool expenses. And now, under the 1997 budget deal, private investments in higher education will receive favorable tax treatment through HOPE Scholarships and ESAs, though not in an ideal way.

The glaring exception is family spending on elementary and secondary education. Despite the recent Clinton proposals, this form of human capital investment alone will continue to be taxed multiple times by states and the federal government. This is indefensible tax policy. By one estimate, those who graduate from high school earn at least 25 percent more, on average, than those who do not, suggesting that high school, at least, is an income-enhancing investment. Many parents pay out of pocket to increase the value of their children's education, through private-school tuition, home-schooling, extra tutoring, and even through voluntary contributions to public school programs.

ESAs and Education Reform

If Congress were to create tax-deductible ESAs for all levels of education, it might inspire states to move forward with broader, yet compatible, reforms. Take tax relief. Minnesota and Iowa already have limited tax deductions for private school expenses. Last year, Minnesota governor Arne Carlson expanded the deduction and added a refundable tax credit of up to $1,000 to promote parental choice among families with under $33,000 a year in income. With tax-deductible ESAs, other states could easily follow Minnesota's lead by adding refundable tax credits to the existing tax deduction, and justify them either on general school choice grounds or as tax policy.

Other states could go the route of Wisconsin and Ohio by creating targeted scholarship programs for students trapped in failing public schools. In both states, state lawmakers chose to create scholarship programs for low-income students in a single urban district (Milwaukee and Cleveland, respectively). These programs have already had much initial success, with test scores for scholarship recipients far exceeding those of similar public school students in some subjects.

For either state scholarships or state tax credits, ESAs would become a handy vehicle for administering funds. Parents could deposit vouchers or tax refunds in their ESA and earn tax-free interest until it is paid to schools. This might, by the way, also make the legal defense of vouchers easier by routing taxpayer money directly to student accounts rather than to schools.

ESAs will be of special interest to homeschoolers who fear participation in charter school or voucher systems. They want their independence, but they are also entitled to fair tax treatment of their own expenses for their children's education.

Parents who deposit money in ESAs from the birth of their child will reap tax savings in 18 years equal to more than half the the cost of a private K-12 education.

ESAs also offer the prospect of avoiding the tuition spiral that tax credits or scholarships can fuel. By allowing families to save money in ESAs indefinitely, even to use the money for a grandchild's education or for retirement, policymakers avoid the "use it or lose it" provision of policies like HOPE scholarships that serve to inflate the cost of tuition.

ESAs would not undermine public education. If meaningful ESAs induce even a modest number of public school students to transfer to private schools, state and local governments may even save tax dollars and increase per-pupil spending in public schools. Here's why: Every transferring student will cost the federal treasury some money in the short run—$875 a year in lost tax revenue, in the example above—but save thousands of dollars, on average, in reduced need for public-school classrooms, teachers, and support services.

In my own state of North Carolina, I computed how many students would have to transfer out of the public schools to offset completely the revenue loss of a $2,500 federal and state tax deduction. It

Illustration by Anatol Woolf

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came to 25,000 students over five years—or an average annual increase in private-school enrollment of about 5 percent. A shift of that magnitude nationwide is not unreasonable to expect from a reform that may halve the cost to parents of a private education. Even after accounting for the revenue loss on existing private school students, it is likely that federal ESA legislation, by encouraging competition and reducing the consumption of public schooling, would save states and local school systems hundreds of millions of dollars a year.

ESAs and Tax Reform

Besides cutting taxes on families and promoting parental choice, deductible ESAs advance the cause of tax reform. Conservative tax reformers should acknowledge the high political hurdles that the flat tax and the national sales tax both face in the short term. Tax reformers need to push individual pieces of tax relief that are valuable in their own right and that advance long-term goals such as neutrality and simplicity. A prime example of this approach is a tax-deductible ESA, particularly one that starts with a small, relatively affordable deduction (say, $1,000 per child) and then gradually moves up to $2,500 per child or more. (Unlimited deductibility is unwise and unnecessary, since some education expenditures are less investments than consumption, such as certain extracurricular activities.)

The tax-deductible ESA is simultaneously tax relief and education reform, but it also establishes an important precedent, as did previous expansions of IRAs and the creation of limited medical savings accounts (MSAs) for small firms and the self-employed in 1996 and for Medicare recipients in 1997. The precedent is that the tax code should treat investment fairly. Individuals should get the same tax treatment as firms. And the tax code should remain neutral as to when taxpayers choose to consume their income.

Unlike conservatives, Clinton has no overarching goal for tax reform. But his strategy of proposing tax relief in small pieces is probably more effective than conservatives' vague promise of something big, some time later on. Rather than trying to swallow fundamental tax reform in one gulp, it's time to emulate Clinton's strategy of taking periodic nibbles. With federal revenues surging and conservatives looking for tax-cut ideas in 1998, tax-deductible ESAs sure look tasty to me.

***John Hood** is the president of the John Locke Foundation, in Raleigh, North Carolina, and the author of* The Heroic Enterprise: Business and the Common Good *(Free Press).*

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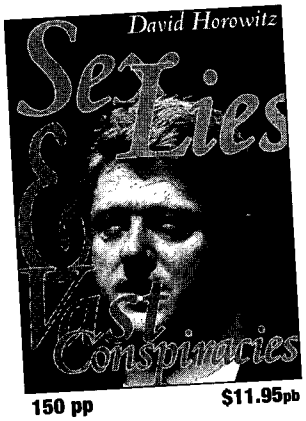

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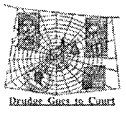
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No Strings Attached

A private college spurns federal aid to save its academic freedom

By John H. Moore

If American athletes in certain premier sports perform poorly in the next Olympic Games, in Sydney, Australia, we may have the federal government in part to blame. Not because it fails to support our teams adequately, but because its intrusion into the affairs of American colleges and universities has effectively reduced the number of collegiate opportunities for budding athletes. In the pursuit of gender equity in college sports, federal regulators interpret and enforce Title IX of the federal Higher Education Act in a way that is having disastrous consequences for several men's sports.

Under the reigning interpretation of Title IX, colleges must in theory meet one of three tests to avoid liability for gender discrimination. They must either: (1) sponsor enough teams to satisfy the "interest and ability" of the underrepresented gender; (2) demonstrate a continued expansion of teams for the underrepresented gender; or (3) have roughly the same proportion of female athletes as there are female undergraduates. But in practice, if a school wants to appease plaintiffs or regulators at the U.S. Department of Education's Office of Civil Rights, it had better satisfy the third test regardless of the first two.

Men's swimming, gymnastics, and wrestling in particular have suffered tremendous cuts and often elimination as colleges and universities have attempted to achieve gender parity by subtraction. Since 1982, at least 99 colleges have eliminated wrestling, 64 have done away with men's swimming, and the number of men's gymnastics squads has fallen from 133 teams in 1975 to 32 today. Maybe these cutbacks will not hurt our Olympic hopes. Maybe there's another way to nurture and develop talent. And maybe a smaller number of college teams can support the levels of excellence needed for Olympic glory. I'm no expert, but I doubt it.

The Financial Stick

As the president of Grove City College, I am not concerned only about the effect of federal regulation on college sports. I am more broadly concerned about its effect on academic independence. For most federal regulations, the federal government's lever with institutions of higher education is financial. If a college accepts federal aid through grants or research contracts, if it accepts tuition or fee money provided to its students by the federal government, or if its students pay their tuition with funds borrowed from private banks

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but merely insured by the federal government, then that college is subject to a vast and complex set of regulations, including those pertaining to gender equity in sports.

I am not opposed to gender equity in sports. At Grove City College, we provide equal athletic opportunities to our women and men. But gender equity is only one of the many regulations that are attached to federal aid, and such regulations often have consequences that we do not like. To avoid these consequences, we refuse to accept any federal aid.

The Courts Intervene

Grove City College learned the lesson of federal funding more than 20 years ago. In late 1977, after the passage of Title IX, the college refused to sign an Assurance of Compliance form required by the federal government. Even then, the college accepted no direct federal aid and, as a private institution, argued that the federal government should have no jurisdiction.

The government thought differently. Some Grove City students received Basic Educational Opportunity Grants (now Pell Grants) and federally guaranteed student loans. So the government contended that the college was receiving federal financial support. Grove City argued that BEOG and student loan funds are aid to students, not to the college. In response, the U.S. Department of Education sued Grove City in 1977 to force it to sign the compliance agreement.

The government never claimed that Grove City had ever discriminated. The case was really about whether financial relationships between our college and the government subjected us to federal regulation. In 1984, in the case of *Grove City College v. Bell,* the Supreme Court held that the student grants constituted indirect aid to the college and thus obligated the college to follow the requirements of the Higher Education Act.

Rather than submit its financial aid office to federal regulation, the college decided that it would no longer accept students with federal grants and would provide needed aid with privately financed scholarships.

The other shoe took a dozen years to drop. The Court ruling in 1984 did not include federally guaranteed student loans. So Grove City continued to accept tuition and fee payments financed by federal Stafford and PLUS programs. In June 1996, however, the U.S. Department of Education changed its policy with regard to student loans. It insisted that Grove City sign an agreement that would have subjected the college to regulation under all of the subsections of the Higher Education Act pertaining to financial aid, including those governing programs in which we do not participate, such as the Pell Grant program.

How much regulation would this have meant? It's hard to say. According to one estimate, there are more than 7,000 separate items—regulations and the frequent modifications issued by the Department of Education—to keep track of. If we had signed the agreement, we would have been required to:

Give the Department of Education access to confidential books, documents, papers, and records;

split loan-payment authorization and the disbursement of funds into separate administrative functions;

submit to nonfederal audits performed in accordance with Department of Education audit guidelines at least every two years;

maintain records in our financial aid office for each student who submits a student aid report regardless of whether the aid for which the student applies comes from federal sources; and

comply with a perjury clause that imposes personal liability on college officers signing required federal forms, something that requires personal knowledge of detailed operations (or very careful wording).

In short, the federal government would have dictated the college's operations in many important respects. Even worse, there are so many financial-aid regulations that we would never be sure whether our policies complied with the law.

Most importantly, there was no way to ensure that the government would not add regulations that might strike at the heart of Grove City's mission. As a private, Christian college, we have legitimate concerns about federal interference in what we teach and how we teach it. This was the most compelling reason for our decision to withdraw from the program.

Free To Pursue Truth

With about 800 students paying for their education with federally guaranteed loans, however, we had to find a substitute. Fortunately, we were ready. Our vice president for finance had been investigating the possibility of offering privately financed student loans for more than a year prior to our decision. The program we designed, operated through PNC Bank, is a completely private student-loan program that competes favorably against the federal loan programs.

Federal regulations allow the government to dictate much of our operations. Worse, there are so many rules we could never be sure we were in compliance.

Now we are entirely free of federal funding. We have no federal scholarships, no federally guaranteed loans, no federal work-study funds, and no

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federal research grants or contracts. We did not withdraw from these programs out of caprice or just for the sake of independence. Nor did we do it because of the compliance costs (although they can be steep).

We did it because we want to be free to pursue our mission. We do not, of course, escape all federal regulation. We still must comply with all of the general regulations that affect everyone—the minimum wage, equal opportunity laws, tax laws, and all the rest. But none of these laws has as much potential to interfere with our mission as the Higher Education Act. The federal government's interpretation of Title IX illustrates the perverse consequences of its regulations. And we see the potential for even greater mischief.

Grove City College is a Christian institution. This implies an approach to teaching and learning—to pursuing the truth—that may be quite different from that at, say, Ohio State or Stanford. If we continued to accept federal aid, how long would it be before the federal government began to proscribe some activities or pressure us to change our curriculum? If we were to accept federal support, the Establishment Clause of the First Amendment to the U.S. Constitution, which prohibits government from establishing a religion, might give the federal government a pretext to interfere with our Christian mission. It was that concern, more than anything, that led us to withdraw from the federal loan programs.

Big Business

I wish other institutions could duplicate the independent stand taken by us, Michigan's Hillsdale College, and very few others. But by now the reach of federal funding is so wide that it may be impossible. In fact, the financial involvement of the federal government in higher education is much greater, both absolutely and relatively, than in K-12 education.

In 1992-93, for example, federal funding to public elementary and secondary schools amounted to about $17 billion, a little less than 7 percent of these schools' total expenditures. That year, direct federal funding of higher education totaled $21 billion, or 12 percent of all higher education spending. Almost $12 billion of that federal spending funded research and development at colleges and universities, about 60 percent of all R&D funds in academia. Other direct funding included special appropriations, nonresearch grants and contracts, and support for independent operations.

But the federal role goes beyond direct funding. It provides indirect support through grants to students (mostly Pell grants) and federally guaranteed loans. Pell grants totaled $4.7 billion in 1992-93, while federally guaranteed student loans came to $17.4 billion. Federal aid to higher education totaled $43 billion five years ago, or close to a quarter of all spending on higher education. Today, it is at least $50 billion.

It is big business, and it's getting bigger. The Clinton administration's HOPE scholarships, created last year, extends aid to students through income tax credits. It also requires that colleges collect and submit information about their students to the Internal Revenue Service. Although the administration has primarily focused on K-12 education, aid to higher education through student grants and loans and through research grants and contracts is also expanding.

The Looming Threat

The insidious nature of expanding federal aid can be seen in a very important change regarding federally guaranteed student loans that is almost certain to occur this summer. There are two categories of federally supported student loans: federally guaranteed loans that are provided by private banks (the indirect loan program) and, since 1994, direct federal loans.

I wish other institutions could duplicate our independence. But by now the reach of the federal government is so wide that it may be impossible.

The interest rate that is charged on these loans is presently based on the 91-day Treasury bill rate. Congress is poised to change that basis, resulting in a cut in the rate charged on all federally guaranteed student loans by about 0.8 percentage points.

Lower interest rates on student loans sounds like a good idea. But leading banks that make these loans have said they would lose money at such interest rates. So Congress is proposing a subsidy to the banks of 0.5 percentage points.

At the time this was written, the issue had not been resolved and it was not clear whether the arrangement would be acceptable to the banks. If it does become law, our privately financed loan program—and any others like it—will be put at a competitive disadvantage in attracting students who rely on financial aid. As it becomes more difficult for institutions like ours to find competitive student-loan resources independent of the government, it will become even harder to avoid its regulatory clutches.

As those clutches control more and more of academic life, we as a nation lose something precious—the freedom of institutions to follow their own star.

John H. Moore *is the president of Grove City College, in Grove City, Pennsylvania. This article is adapted from a speech he delivered in Canton, Ohio.*

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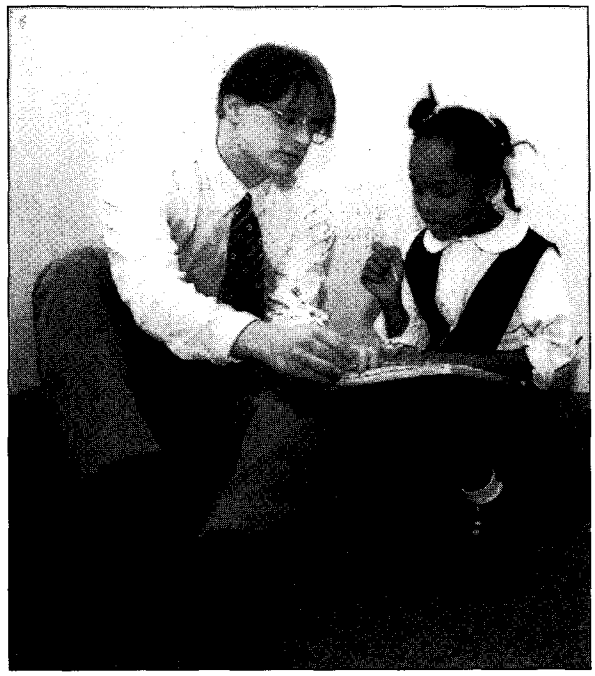
Blocking *the* Exits

Libertarian opposition to school vouchers is an attack on freedom

By Clint Bolick



Above: Inner-city schoolchildren get one-on-one attention at Cleveland's HOPE Central Academy. Right: Private schools such as Marva Collins Preparatory took root after Milwaukee established school choice.

Hope Academy photo by Jack Orton / *Milwaukee Journal Sentinel*; Marva Collins photo by Tom Lynn / *Milwaukee Journal Sentinel*

What do many thoughtful, committed libertarians and Sandra Feldman of the American Federation of Teachers union have in common? Almost nothing—except their opposition to school choice. Answering the concerns of these libertarians is essential to defeating the reactionary likes of Feldman and realizing the potential of school choice.

School vouchers empower parents to spend their public education funds in public, private, or religious schools. The cause of choice unites conservatives, most libertarians, and growing numbers of centrists and even liberals. It brings together disparate reformers because all at once it expands parental autonomy, increases competition, promotes educational equity, and addresses the greatest challenge facing America today: ensuring educational opportunities for low-income children in the inner cities.

Some libertarians fear, however, that school vouchers will not expand freedom, but will instead turn the private schools that serve roughly 11 percent of America's youngsters into clones of failed government schools. That price, they argue, is too high, even for the sake of expanding the private sector in education and improving opportunities for millions of youngsters who desperately need them.

I wish the school-choice naysayers could have shared my experiences with the public-school monopoly and the choice alternative. My original career aspiration was classroom teaching; remarkably, upon my graduation from college, the New Jersey education cartel conferred upon me lifetime teacher certification. But my experiences as a student teacher left me convinced that our system of public K-12 education desperately needed fundamental change. I concluded, first, that parents, not bureaucrats, should control essential education decisions; and second, that a system of parental choice should replace the command-and-control system of public education in America.

For a long time school choice held only academic interest for me, but I became downright militant about the issue in 1990, when I had the honor of defending the constitutionality of the nation's first school-choice program, in Milwaukee. I walked the hallways of the schools that 1,000 economically disadvantaged children were able to at-

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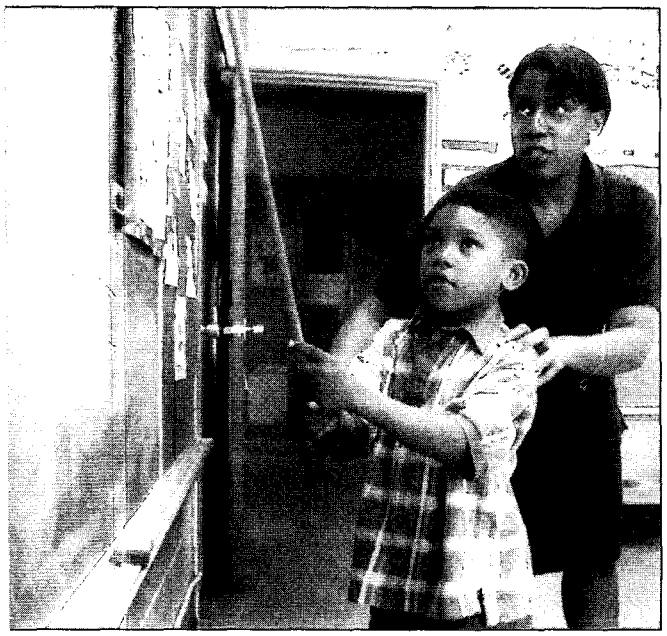
tend *for the* first time. I talked to their parents, most of whom were themselves poorly educated yet keenly understood that this was a chance—perhaps the only chance—for their children to have a better life. And I saw the beaming faces of children—beacons of pride, self-discipline, and hope. That's when school choice became a matter of heart and soul as well as mind.

The nation's second school-choice program, launched in Cleveland in 1995, had an equally profound effect on me. It has permanently etched the figure "one in 14" in my memory. You see, children in the Cleveland Public Schools have a one-in-14 chance of graduating on schedule with senior-level proficiency. They also have a one-in-14 chance, each year, of being victimized by crime in their school. When a school district can offer its children no greater chance of learning the skills they need to become responsible citizens than of being victimized by crime during the school day, we are in serious jeopardy.

The Specter of Regulation

I do not mean to diminish the ever-present specter of government regulation of private schools. When it was enacted in 1990, Milwaukee's



school-choice program was not only challenged in court, but also sentenced to death by bureaucratic strangulation. The education establishment insisted that private schools meet all state and federal regulations applicable to public schools. Not surprisingly, every single private school refused to participate under those conditions. We fought these regulations in court even as we were defending the program's constitutionality.

The regulatory threat from federal school-choice proposals is even more ominous. For example, when some members of Congress proposed parental-choice legislation for the District of Columbia last year, we found ourselves battling to head off all manner of federal regulations on participating private schools.

Though we won both these skirmishes, we know the regulatory threat is serious. But these episodes suggest caution, not abandonment, of this freedom enterprise. The position of school-choice critics is akin to resisting the demise of communism because the free markets that would emerge might be subjected to government regulation. This is hardly a Hobson's choice.

Virtually all libertarian arguments against parental choice are grounded in hypothetical speculation. And the greatest antidote to speculation is reality. But even the critics' worst case does not trump the value of choice. The critics of choice point to the example of American higher education as the ultimate horror story of government control. In the 1980s, the U.S. Supreme Court ruled that postsecondary institutions that accept any federal funds—even student loan guarantees—must also submit to federal regulation. So federal regulators have now ensnared all but a handful of fiercely independent private colleges.

But from the standpoint of our current system of elementary and secondary education, this so-called nightmare looks more like a dream. Libertarian alarmists warn that vouchers will lead to a system of primary and secondary schools under monolithic government control. But that's exactly what we have already! Only 11 percent of America's children attend independent elementary and secondary schools, while 89 percent attend government schools. Moreover, private schools already are subject to regulations concerning health and safety, nondiscrimination, the length of the school year, curriculum content, and the like.

In my view, our overwhelming concern should be for those children who are already captive of the educational standards and ideological dogma of the public-school monolith. Surely any reform that diminishes the near-monopoly status of government schooling—even at the cost of greater regulation of private schools—will still yield a net increase in freedom. We should be particularly confident of that outcome when the mechanism of reform is a transfer of power over educational decisions from bureaucrats to parents.

Moreover, the regulatory threat to private-school independence is simply not illuminated by reference to higher education. In that instance, federal oversight entered an arena of vibrant competition between a vigorous and effective public sector and a vigorous and effective private sector. The horizons for elementary and secondary schools, by contrast, are limited by a dominant, overregulated, and ineffective public sector. The likely main outcome of expanding access to the

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highly effective, lightly regulated private sector will be to deregulate the public sector.

And that is exactly what we are seeing. The mere prospect of school choice has already sparked deregulation of public schools. In Milwaukee, efforts to increase regulation of private schools have failed, while the public sector has responded to choice by allowing more flexibility in the management of public schools and passing two charter-school statutes. In Arizona, a 1994 parental choice proposal in the state legislature failed by just a few votes, but a "compromise" produced the nation's most ambitious charter-school legislation. Today, one-sixth of public schools in Arizona are charter schools, many of which are operated by private nonprofit and for-profit entities.

The Marketplace Meets the Classroom

Parental choice is the cornerstone of market-oriented education reforms. If we liberate public education funding from the grip of school districts and let children take it wherever they go, we will create a dynamic educational marketplace. I predict that, if we expand these reforms across the nation, then public schools will quickly lose their eight-to-one advantage in enrollment. Instead we will enjoy a system of choice among government schools, quasi-public charter schools, quasi-private charter schools, and private schools; in sum, a system far more free than the command-and-control system to which the overwhelming majority of America's children are confined today.

I would remind critics of choice that other safeguards support a firewall against excessive regulation. First, private schools can decide for themselves whether to accept choice funding from the government. In Milwaukee, when choice was expanded to religious schools, they were all forced to think long and hard about participating and accepting the modest regulations imposed by the program. In the end, more than 100 of 122 private schools in the city agreed to participate. Critics worry that schools may be unwisely tempted by the prospect of funding, or that they will tolerate rising regulation after becoming dependent on the funding. For the many inner-city schools that are approaching insolvency, this may not be a bad deal. But that is a choice that the schools should be trusted to make on their own—and anti-voucher libertarians who argue otherwise are indulging in uncharacteristic paternalism.

Some schools will exercise their fundamental right not to participate. At the elementary and secondary level, many families can afford the median private tuition of $2,500 to $3,500. We always will have private schools that thrive outside of a choice system, and we should vigorously protect those schools. But that is not a sound basis for denying opportunity to children who cannot afford a private-school education but desperately need it.

A second safeguard is the U.S. Constitution itself. First Amendment precedents forbid "excessive entanglement" between the state and religious schools. If regulations supplant essential school autonomy, they will be struck down.

Perhaps most important, the power of the education establishment will diminish in exact proportion to the power gained by parents. The education establishment fights every meaningful parental choice proposal as if its very survival depends on it—because it does.

The more zealous and irresponsible libertarian critics oppose vouchers because they wish to see the system of government-run schools collapse altogether. The reality is that the public funding of education enjoys nearly unanimous public support. The most extreme libertarians are missing—indeed, helping to defeat—the chance to end the government-school monopoly and to allow public education to take place outside the public sector.

For some of the kids involved, getting out of inner-city public schools is literally a matter of life and death. Many of my libertarian opponents on this issue are people of enormous good will, but when I see them blocking the exits for these children, I cannot look upon them with affection. I understand, even share, their concerns about government's destructive power. But I do not understand why they fail to see where the interests of freedom lie in this fight.

The fear of government regulation is valid, but not a sound basis for denying opportunity to children who desperately need a private-school education.

To them I say: When you actively oppose parental choice, please know what you are doing. You are aiding and abetting the most reactionary forces in American society. They trot you out and use you to preserve the status quo. It is a perverse spectacle.

Ted Kennedy . . . Jesse Jackson . . . Kweisi Mfume . . . Eleanor Holmes Norton . . . Norman Lear . . . Bill Clinton . . . Richard Riley . . . Keith Geiger . . . Sandra Feldman . . . Bob Chase. Among those enemies of change, my fellow libertarians do not belong, for they want what I want: freedom. I believe that a system of parental choice would mark the greatest domestic expansion of freedom in this century.

Friends, come over to the freedom side.

Clint Bolick *is the vice president and the director of litigation of the Institute for Justice, a public-interest law firm based in Washington, D.C. This article is adapted from a debate at The Heritage Foundation.*

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Memphis's Medical Graceland

Traditional health care neglects the working poor. A church-based clinic steps in

By G. Scott Morris

After more than a decade of providing health care for the working poor of Memphis, Tennessee, I have grown certain there is no single solution for providing quality medical care to the nation's poor. No government agency or program will be able to meet all of their needs. Quality health care for the poor must always include a variety of not-for-profit, privately funded solutions alongside publicly supported programs.

I base this conclusion on 10 years' experience in starting, operating, and expanding the Church Health Center of Memphis, which provides primary health care for the community's working poor and their families. Over the years, we have provided care to more than 22,000 patients, and we now handle about 30,000 visits a year. We are open about 70 hours a week, from 7:30 A.M. until 9 P.M. on weekdays and from 8 A.M. to noon on Saturdays.

We work these long hours because minimum-wage employees cannot easily leave work for daytime visits to the doctor. During the workday we have a paid staff, but we can offer evening and Saturday office hours only with the volunteer assistance of more than 400 Memphis physicians and hundreds more nurses, dentists, and nonprofessionals. Medical specialists agree to see patients in their own offices, free of charge. We ask each of our volunteers to help out just once every two or three months because we want them to avoid burnout and stay with us for 30 years.

Our targeted patient population is working people who have fallen through the health-insurance safety net. These are the people who, without complaint, cook our food, shine our shoes, and will one day dig our graves—in short, who make our lives comfortable. They do the best they can but when they get sick, they are stuck. They may sit at home and hope they get better. If they do not improve, they seek other options, but in the last few years, those options have shrunk. Fortunately, thousands of the uninsured working poor in Memphis have found the Church Health Center.

Regular patients must meet certain criteria. We treat anyone under 18 or over 65 who is uninsured or who has only Medicare. All other adult men must be working at least 30 hours a week, and women at least 20 hours a week, except moms with children under six. We discourage patients with health insurance, because they have other options.

We are not a free clinic. Our experience teaches us that poor people are not looking for a handout, but for something they can afford. Therefore we charge on a sliding scale according to income. The minimum payment per visit is $10 and patients with an outstanding debt are expected to pay at least $2 a week. If you fail to keep your appointment or pay your bill, you cannot come back. (We rarely have to enforce this policy.)

A Flawed Solution

The Church Health Center has thrived amid the nationwide debate over health care and the state's reform of Medicaid. Now with the advent of the federal "KidCare" program, which provides billions of dollars for uninsured children, we are hearing once again that only government can address the unmet needs of the poor and uninsured. Although the funding for "KidCare" may create innovative new programs, no state should claim that all children will now have health insurance. We

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know from our experience in Tennessee that it will never happen.

In 1994, Tennessee reformed its Medicaid program and renamed it "TennCare." The theory behind it was that the state could save money by operating Medicaid along the frugal principles of managed care and use the savings to insure more people, particularly the working poor. In fact, its sponsors said it would extend health care to all the citizens of Tennessee still uninsured. But it has done no such thing.

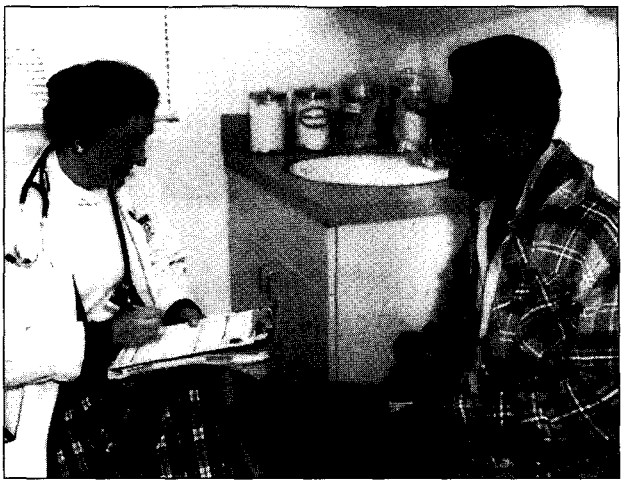
Today a person working in a minimum-wage job has a more difficult time receiving medical care than before the arrival of TennCare. When the program began, the state intended to divert every dollar that had gone into Medicaid into 11 new managed-care organizations (MCOs). At the same time, it planned to add another 200,000 working but uninsured patients to TennCare rolls. But the state miscalculated the costs of operating the MCOs and extending coverage. The savings from managed care were not enough to fund both the expenses needs of new insurance companies and health care benefits for the working poor. As a result, in January 1996, TennCare changed the rules to make the uninsured working poor essentially ineligible.

At about the same time, under TennCare the state cut back on funding for medical education. Memphis's city hospital (the "Med"), a teaching hospital that had served many of the working poor, suffered a cut of $27 million. To cope with this loss, the Med effectively eliminated services for the working poor, who had been receiving routine health care in its emergency rooms.

Of course, some people are better off under TennCare. The program has been a godsend to everyone who had previously been uninsurable due to pre-existing conditions and did not qualify for Medicaid. TennCare has been bad, however, for the working poor who have been eliminated from the state's rolls and shut out of institutions that have traditionally cared for them. In addition, the people who designed TennCare acknowledged that, even if it were fully funded, it would not extend coverage beyond about 95 percent of the population. At any given time, tens of thousands of people are experiencing changes in their eligibility, and the bureaucracy cannot keep up. In Memphis, a 5 percent gap would leave at least 50,000 people uninsured.

Despite TennCare, demand for our services remains high. A mother recently brought her baby to our center with a fever of 104 degrees. She had already been turned away from three other facilities because her baby was "not sick enough" and she did not have TennCare. She had applied for TennCare twice and been turned down without explanation. Fortunately, we were able to care for the baby that day and make him a regular patient.

Last year, I saw a 10-year-old boy who could not speak a word. His tongue was bound to the floor of his mouth, a congenital condition commonly referred to as being "tongue-tied." This problem calls for a relatively simple surgical solution, but the boy's TennCare MCO repeatedly refused to pay for the procedure because it was considered



The Church Health Center serves the working poor of Memphis with a combination of paid staff such as medical assistant Addison MacFarland (top photo, right), volunteer physicians (top photo, left, and middle photo), church volunteers (bottom), shown here sorting the contents of pill samples donated by a city hospital.

Photos courtesy of the Church Health Center

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"cosmetic surgery." The family's surgeon and I had to document the problem and make repeated calls before the procedure was approved.

Filling a Gap

The Church Health Center responded to these changes in 1996 by opening a walk-in clinic. Every day we typically see about 20 uninsured patients who come to the clinic without an appointment and need immediate treatment. Their problems range from colds and sore throats to broken bones and life-threatening diseases. In the past year, we have treated four people with gunshot wounds who had been turned away at hospital emergency rooms because they were uninsured.

Our walk-in clinic has provided unexpected benefits for the health of our community. We now care for more African-American men than ever before. Many poor black men do not seek health care until their condition is dire, but our walk-in clinic is changing that pattern for a growing number of them. The scenario usually unfolds like this: A man comes to our clinic because he is too sick to go to work. As we treat his acute illness, we note that he has diabetes or hypertension or some other significant chronic medical problem. We then offer him an appointment at the health center. Because his experience at our walk-in clinic is so positive, he agrees to become a regular patient. In a similar fashion, we have captured entire white and Hispanic families who first come to us because their babies are sick and they cannot afford a private pediatrician.

The Spiritual Dimension

Our center differs from government-funded facilities in several ways, but perhaps none is as important as our efforts to address the spiritual dimension of patients' lives. I would estimate that 50 percent of the people who come to primary-care doctors have no medical problem. They may complain of back pain but in reality suffer from a broken heart. I cannot cure such maladies in a 15-minute office visit, but we are always aware that every patient's life and illness involve matters of both body and spirit, so we have two full-time pastoral counselors on our staff. Although we do not actively evangelize patients when they are sick, we do believe that our care for those who are ill and have nowhere else to turn is a powerful display of faith to many people who feel lost and alone.

We view our work as a ministry of all the people of faith in Memphis, and this is reflected in the way we raise our operating funds. More than 150 local congregations together contribute $1 million a year to our work. They range from conservative to liberal, comprising black churches as well as white, Baptist and Presbyterian congregations as well as Jewish and many others. We are united in our belief that God calls us to care for our bodies as well as our spirits and to care for the poor who are sick.

The government cannot treat spiritual ailments alongside physical ones and we should not ask it to. For this reason, we do not seek any government funding. I believe that government has a large role to play in health care for the poor, but our mission is beyond the scope of government. We are trying to develop the means within our community to take care of our neighbors, and we cannot look to Washington to make it happen.

The Barriers

After 10 years, there is little doubt about the long-term viability of the Church Health Center, but unnecessary barriers continue to hinder the effectiveness of our work.

Consider my experience with a program we call the "MEMPHIS Plan." In 1991, in an effort to expand the services of the Church Health Center, we created a network of physicians, hospitals, and laboratories that volunteer their time and resources to care for uninsured patients. The program works like this: Doctors all over the city are each asked to admit about 20 patients into their practice *gratis* and treat them as they would anyone else. Every hospital and every laboratory in the city provides free diagnostic procedures whenever these patients require them. For serious cases, two hospitals in town have agreed to admit patients on a charitable basis.

Patients enroll in the MEMPHIS Plan through their employer. To qualify, the employee must make less than 150 percent of the federal poverty line. The program charges only an administrative fee of $35 per month, of which at least $10 must be paid by the employer. Blue Cross of Memphis handles the collection of these monthly fees and the Memphis and Shelby County Medical Society recruits physicians to volunteer for the program.

In 1991, we were ready to begin the MEMPHIS Plan when we were told by the state Department of Insurance that the program was illegal! It claimed we were starting a new insurance company and had not met all of the state requirements, which include setting aside adequate financial reserves and guaranteeing chiropractic care.

Government cannot treat spiritual ailments alongside the physical ones, and we should not ask it to. That is why we seek no government funding.

To counter this objection, the Tennessee Medical Society presented a bill to the state legislature that proposed to exempt the MEMPHIS Plan from such regulation. The day I had to become a lobbyist for this bill was truly one of the worst days of my

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life. When I introduced myself to legislators as a physician, I was treated like a henchman for Saddam Hussein. Elected officials could scarcely believe the bill furthered no hidden agenda or financial payoff. State legislators seem unaware that most physicians are primarily driven by the desire to provide better health care for their patients.

The good news is that this law passed unanimously. Soon after we began, the state even agreed to indemnify doctors volunteering for the MEMPHIS Plan against malpractice suits. This offered a sense of security to our physicians and helped in recruiting new volunteers. Then suddenly, in early 1997, I was told that the new TennCare regulations had eliminated the plan's liability protection. No explanation was given. We have never had a malpractice suit. I was told only that the regulations had changed. Through the efforts of several state and local officials, the liability coverage was finally reinstated at the end of 1997. The MEMPHIS Plan has so far cared for 2,000 patients and now has the capacity to grow to cover more than 7,000 lives.

This was not the end of our troubles with the regulatory state. Ever since the Church Health Center opened, we have had a wonderful relationship with Memphis's city hospital. It has given us $3,000 worth of vital pharmaceuticals such as penicillin and insulin every month. Last Christmas, however, the Med told us that it would no longer be able to supply this medicine, because the federal government had recently begun to aggressively enforce anti-kickback legislation that prevents a hospital from giving doctors a financial incentive to refer patients there. What a Christmas present! Fortunately, William Frist, a physician and a U.S. senator from our state, persuaded the inspector general of the U.S. Department of Health and Human Services to grant us an exemption before our medicine supply was cut off.

The Church Health Center is an example of a program that can make a difference. Recently we hosted a conference at which people from 35 cities came to learn how they could replicate the projects of the Church Health Center in their own communities. We need to recognize and nourish the many creative endeavors going on all over the country. The best ideas may be those we have not yet thought up. To policymakers in the health-care arena, I say: These programs are looking to you simply to pat them on the back, stand aside, and let them work.

***G. Scott Morris** is a physician, a United Methodist minister, and the executive director of the Church Health Center of Memphis, Tennessee. This article is adapted from his presentation at a November 14, 1997, conference co-sponsored by The Heritage Foundation and the State Policy Network.*

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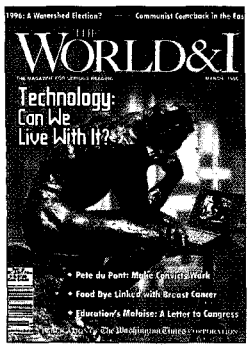

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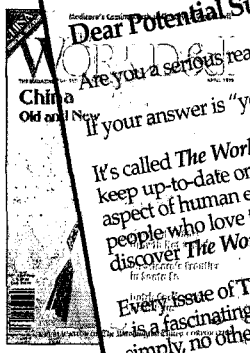

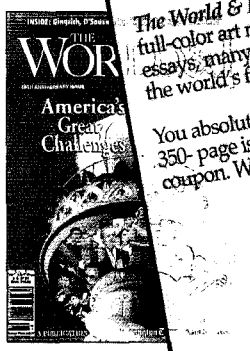

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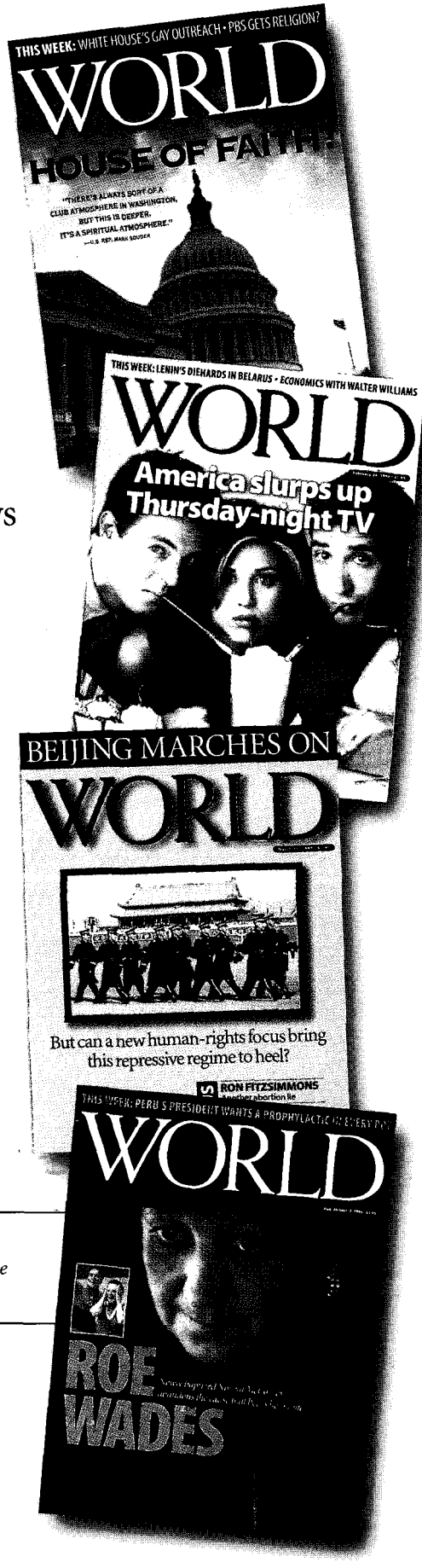
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